TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 346.~~ 68

THE UNION RAILROAD COMPANY OF BALTIMORE, APPELLANT,

vs.

JAMES J. DULL, JACOB C. BAMBERGER, JOHN ELLICOTT, SAMUEL M. SHOEMAKER, AND BENJAMIN F. NEWCOMER, ADMINISTRATORS c. t. a. OF SAMUEL M. SHOEMAKER, DECEASED; THE CANTON COMPANY OF BALTIMORE, AND THE NATIONAL MECHANICS' BANK OF BALTIMORE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED OCTOBER 6, 1884.

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1 THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the city of Baltimore on the first Monday of April, being the seventh day of the same month, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Hugh L. Bond, circuit judge; Thomas J. Morris, judge Maryland district; Archibald Stirling, Jr., Esquire, attorney; John M. McClinton, Esquire, marshal; James W. Chew, clerk.

Among others were the following proceedings, to wit:

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL, JACOB C. BAMBERGER, JOHN ELLICOTT, Samuel M. Shoemaker, The Canton Company of Baltimore, The National Mechanics' Bank of Baltimore. } In Equity

2 Be it remembered that heretofore, to wit, on the 27th day of October, 1879, the said James J. Dull and Jacob C. Bamberger, by I. Nevitt Steele and A. W. Machen, Esquires, their solicitors, produced and filed in the circuit court here the following transcript of the record and proceedings of the circuit court of Baltimore city, in the eighth judicial circuit of the State of Maryland, to wit:

Record.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

At a session of the circuit court of Baltimore city, in the eighth judicial circuit of the State of Maryland, begun and held at the court-house, in the city of Baltimore, in and for the city aforesaid, on the second Monday in January (being the thirteenth day of the same month), in the year of our Lord one thousand eight hundred and seventy-nine.

Present: The Honorable Robert Gilmor, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the circuit court of Baltimore city; Philip M. Snowden, sheriff; James R. Brewer, clerk.

3 Among other were the following proceedings, to wit:

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

Be it remembered that at the above term, to wit, on the tenth day of February, in the year of our Lord one thousand eight hundred and seventy-nine, came The Union Railroad Company of Baltimore into the circuit court of Baltimore city here, by William A. Fisher,

Esquire, its solicitor, and exhibited to said court its bill of complaint in form following, to wit:

To the Honorable Robert Gilmor, judge of the circuit court of Baltimore city:

The bill of complaint of The Union Railroad Company of Baltimore, a body corporate and politic, humbly shows unto your honor that your orator was authorized by its charter to construct a line of railway from a point near the Belvidere bridge, in the city of Baltimore, to tide-water at Canton, and in the spring of the year eighteen hundred and seventy-one your orator advertised for proposals for the said work of construction; that bids were made by a number of persons, and among others, by William M. Wiley and James J. Dull, of the State of Pennsylvania, and R. Snowden Andrews, of the city of Baltimore, who did not bid jointly; that finally, upon the opening of the bids, an arrangement was made between the said Wiley, Dull, and Andrews, by which they obtained, as copartners, the contract for the construction of the whole work, and on the
4 first day of May, A. D. 1871, a contract, in writing, for the said construction, with full details and specifications and prices, was entered into between your orator and the said Dull, Wiley and Andrews, as copartners, and on the 6th day of July following a supplemental contract, in writing, was entered into between your orator and the said Dull, Wiley and Andrews, by which the contractors were allowed to construct a part of the work by open cut in place of drift-tunnel, and certain other modifications were made in the terms of the former contract, all of which will more at large appear from copies of the said contracts, which your orator has not at present in its possession, but which will be hereafter filed as part of the record, to be hereafter mentioned.

Further complaining, your orator shows unto your honor that shortly after the execution of the said supplemental contract your orator was informed that the said R. Snowden Andrews had disposed of his copartnership interest to the said Dull and Wiley, who thereby became sole contracting parties, to which change your orator consented.

Your orator further shows that the said Dull and Wiley, as sole contractors, as your orator then believed, proceeded with the works mentioned and contemplated in said contracts, and finally completed the same, and payments were from time to time made on account thereof by your orator; and a controversy arose between your orator and the said Dull and Wiley as to several matters connected with the said contracts and the compensation proper to be paid by
5 the said railroad company to the said Dull and Wiley, the said Dull and Wiley claiming that they were entitled to recover a large additional sum, which was, among other things, very largely based upon the pretext that they had contracted with reference to a certain model for the tunnel presented to them by John Ellicott, the acting chief assistant engineer of the company, and that a change to their disadvantage was afterwards made by your orator,

and it was on the other hand claimed by your orator that no such change was made, and that the contractors had been overpaid.

Your orator further shows unto your honor that articles of agreement were entered into between your orator and James J. Dull, as surviving partner of said Wiley, who died while the controversy was pending, by which a suit which had been brought against your orator by said Dull for his pretended causes of action in the Baltimore city court was referred to the arbitrament of Henry Tyson and Robert K. Martin and a third person to be appointed by them; that said Tyson and Martin appointed H. D. Whitcomb as the other arbitrator, and the said three arbitrators proceeded to hear and determine the matters submitted to them, and finally most unjustly awarded against your orator, in favor of the said Dull as such surviving partner, the sum of about $54,000, and judgment was entered on the award by said court against your orator for the sum of $54,159.50, all of which will more fully appear from a transcript of the record in said cause, which your orator is unable at present to file because the clerk could not complete it in time, but which your orator will file in a few days.

6 Further complaining, your orator shows unto your honor that at the time the specifications and other papers were prepared for the said biddings, and at the time of the preparation by your orator of the said contracts and of the execution of the same, the chief engineer of your orator was Charles P. Manning and the assistant chief engineer was the said John Ellicott, and that the said Manning was engaged in the completion of some work on the Cincinnati and Marietta Short Line railroad in Ohio which rendered it necessary that he should be absent for long periods from the city of Baltimore, by reason whereof the preliminary arrangements with reference to the preparations for the bidding, the interviews with the parties proposing to make the bids and the contracts before mentioned, and, indeed, the general superintendence of the work for some months from its commencement, was left almost entirely to the said Ellicott, in whom your orator and the said Manning then reposed the fullest confidence.

Further complaining, your orator shows unto your honor that the said Ellicott remained in his said position for the period of about a year, when he left the service of your orator, not by reason of any distrust of his capacity or integrity, but by reason of some differences between him and the said Manning, the chief engineer, who had then finally returned to the city of Baltimore.

Your orator further shows unto your honor that there was no just foundation whatever for any of the pretended claims of the said Dull which were claimed before and allowed by the said arbi-

7 trators, but they made several allowances, which amounted in the aggregate to the sum before mentioned.

Your orator further avers that the said Ellicott was presented and sworn before the arbitrators as a disinterested witness on behalf of the said Dull, and upon his testimony, mainly if not entirely, the said arbitrators allowed the pretended claim of the said Dull, based upon an allegation in the change of the model for the construction

of the said tunnel; and also other of the claims made by the said Dull, to which change said Ellicott testified, although in fact no change was made of the execution of said contract.

Your orator further avers that said Dull himself was sworn and examined before the arbitrators and testified, among other things, that he was the sole surviving contractor, and that the only contractors had been said Andrews, Wiley, and himself.

Further complaining, your orator shows unto your honor that after the entry of the said judgment the same was paid by your orator, partly in cash and partly in its promissory notes, the principal, together with interest notes payable every six months, all made by your orator and payable to bearer or to the person to whose order they might be thereafter made payable; that all of said notes have now been paid, except one note of $14,000, due on the tenth day of February, 1879, one for $18,562.15, due on the tenth day of February, 1880; and three interest notes, one for the sum of $993.14, due on the tenth day of February, A. D. 1879; one for $556.86,
8 due August 10th, 1879; and one for $556.14, due February 10th, 1880.

Further complaining, your orator shows unto your honor that within three months past an action was tried in the circuit court of the United States for the eastern district of Pennsylvania, wherein one Milo W. Locke, who was formerly in the employ of the said contractors on said work, was the plaintiff, and the executor of the said William M. Wiley *were* the defendant, and the said James J. Dull was examined as a witness for the defendant, and in the course of his cross-examination the said Dull admitted that the said Dull, Wiley, and Andrews, and afterwards the said Dull and Wiley, were not the only persons that were interested in the said contract, and that, in fact, they had two secret partners in the transaction, who retained their interests until the completion of the work and during said controversy, one of them being Samuel M. Shoemaker, of the city of Baltimore, and the other being the said John Ellicott; and the said Dull then and there admitted that he had paid large sums to the said Ellicott on account of his interest in the contract, but had not yet fully paid him.

Your orator further avers that a party who was present in court repeated the said evidence to your orator, and thus conveyed to your orator the first intimation of the gross fraud which has been perpetrated upon it.

Your orator further avers and charges that it has since learned that at least the sum of eighteen thousand dollars was paid by the said Dull and Wiley to the said Ellicott, of which ten thou-
9 sand dollars was paid in a single check.

Further complaining, your orator avers and charges that the amount awarded to the said Dull was so awarded by virtue of the said contracts and by means of the covinous and fraudulent conduct of the said Dull and the said Ellicott; and your orators are advised that the said construction contracts and the said arbitration contract were obtained from your orator by the fraud, covin, and deceit of the said Dull and Ellicott, with the knowledge

of the said Samuel M. Shoemaker, and the said award and judgment were obtained by the fraud and deceit of the said Dull and the said John Ellicott, and your orator is advised that the said contracts and the said award and judgment are by the rules of equity void, so far as your orator is concerned.

Further complaining, your orator shows unto your honor that all of the said unpaid notes yet remain the property of the said James J. Dull or of the said Samuel M. Shoemaker, and the two of said notes which will be due on the tenth day of February, A. D. 1879, have been sent by J. C. Bamberger, of Harrisburg, Pennsylvania, trading under the name of the Mechanics' Bank, to the National Mechanics' Bank of Baltimore for collection, and are now in the possession of the last-named bank, and the same were so sent by the said Bamberger, as the agent of the said James J. Dull.

Further complaining, your orator shows unto your honor that when the said payment of cash was made and said notes were
10 given by your orator a stay of execution on said judgment was agreed upon so long as your orator should pay the said notes according to their tenor; and the Canton Company, of Baltimore, another body politic and corporate, executed a contract with said Dull, whereby it guaranteed the payment of said notes, a copy whereof will appear in the transcript of the record in said cause.

Your orator further shows that the said notes due on the 10th day of February next bear no endorsement save that of the said Bamberger, which appears in his capacity of cashier of his bank, only and merely for identification into collection, and for this reason and because of the production of the money there is no necessity in any event to present or protest the notes, which would be injurious to the credit of your orator, without justification.

Your orator further avers that it is quite able to meet the said notes as they mature, and is induced to file this bill only by the wish to prevent the complete consummation of the said fraud and cheat upon it. In evidence of its good faith in this particular it now tenders herewith and brings into court the full amount of the two notes which will be payable on the 10th day of February, 1879, to be disposed of as your honor may direct, and to be returned to your orator only when it shall make good its said allegations of fraud.

Your orator further shows that it is advised that the said construction contract and the said contract for arbitration are and were not binding upon your orator, because the same were obtained from it by fraud and imposition, in which the said Dull and Elli-
11 cott are active parties and the fruits of which were received by said Shoemaker with full knowledge of the fraud, and that the said award, judgment, and promissory notes are not binding on your orator, for the like reasons; and it is further advised that it is entitled to a decree declaring void the said contracts, award, judgment, and notes, and providing for a return to your orator by the said Dull, Shoemaker, and Ellicott of the sums which have been obtained under said judgment, and to a cancellation of the notes, and to an injunction preventing the defendants from pro-

ceeding to enforce said judgment, the said notes, or said contract of guaranty, and from parting with said notes.

To the end, therefore, that the said James J. Dull, Samuel M. Shoemaker, John Ellicott, Jacob C. Bamberger, and the National Mechanics' Bank of Baltimore may answer the premises under their respective corporal oaths, and that the said Dull, Shoemaker, and Ellicott may specifically state whether any contracts or writings were executed between them or them and others in relation to said contract or said work, or money thence arising, or in any manner connected with the work to be done or being done upon the line of the road of your orator; if so, when they were executed and what have become of the same, and that they produce and file the same with their answers, and that they may specifically state what verbal agreement, if not reduced to writing as aforesaid, were made between them or between them and others, and that they may produce copies of all accounts which have ever been rendered between
12 them, or any of them, and state when they were rendered, and that said Shoemaker may produce all letters ever received by him from said William M. Wiley, said Dull, or said John Ellicott, and said firm of Dull, Wiley and Andrews, or of Dull & Wiley, and copies of all letters ever written by him to any of them, and that said Dull shall produce all letters ever received by said firm of Dull, Wiley and Andrews, or Dull and Wiley, or by himself, from said John Ellicott, and especially the letters written by said John Ellicott to said John Dull since the obtention of the said judgment making demands or requests for more money, and copies of all letters written by the firm of Dull, Wiley and Andrews, or said Dull himself, to the said Shoemaker, said Andrews, and said Ellicott, in relation to said work, said contracts, and all letters written to any of them since the first day of March, 1871, and produce all letters received by him or said firms from any of said parties since said 1st day of March, 1871, and that said Shoemaker, Dull, and Ellicott may disclose and state what amounts of money have been paid to said John Ellicott and when said payments were made, and may produce and file with the answer all checks which were paid to said John Ellicott, and that said Shoemaker, Dull, and Ellicott may disclose and state the respective interests held by them, said Wiley and said Andrews in the moneys to be derived from said work or said construction contracts, and may disclose and state what sums of money have been thence received by said Shoemaker, and when and in what amounts the same was paid to him, and may produce and file all accounts whatever rendered at any time to said Shoemaker
13 by said Dull, Wiley and Andrews; Dull and Wiley, said William M. Wiley, said James J. Dull, or any clerk or agent of any of said parties, and produce with the answers all checks paid to said Shoemaker; and that they may all disclose and state whether any other persons had any interest in said work or contracts, and what interest, and may disclose what moneys were paid by them, or any of them, in connection with said work, to any other person's interest in the profits thereof; and that said Shoemaker, Dull, and Ellicott may disclose and state what share, interest, or right in the profits to be de-

rived from said construction contracts each of them and each other party in interest was entitled to; and that said John Ellicott may produce with his answer copies of all letters written by him to said Wiley, to the personal representatives of said Wiley, to said James J. Dull, to any of the said firms, to said Shoemaker, or said Andrews, and all letters received by him from any of them, and all accounts and all paper-writings of whatsoever character executed by any of the said parties or firms received by him; and that the said Bamberger may state when he received the said promissory notes, from whom, under what circumstances, and under what understanding or agreement, and may state whether the said Dull kept any account with him and what amount said Dull had with him when this bill was filed, and may produce and file with his answer a true and full transcript of the account of said Dull with him, and state whether any charge, if any, has been made in the entries of said ac-
14 count since the first day of February, 1879, and that the said Dull and Shoemaker may disclose and state where the three notes aforesaid, one of which will be due in August next, and two in February, 1880, now are, and where they were on the 8th, 9th, and 10th days of February, 1879, and whether they were then in the same condition in which they were when received from your orator; and to the end also that the said contracts of May and July, 1871, and the contract for arbitration, the contract of the Canton Company of Baltimore, the said award, judgment, and promissory notes may be declared to be void against your orator, and that the said notes remaining unpaid may be brought into this court and cancelled, and that the said Dull, Shoemaker, and Ellicott may be compelled to refund to your orator the sums which they have received in cash on account of said judgment and in payment of said notes; and that they may, with their attorneys and agents, be enjoined from issuing any execution on said judgment or bringing suits on the same or any of said notes or the said contract of guaranty; and that the said Dull and Shoemaker may be enjoined from negotiating or parting with any of said notes or allowing them to be negotiated or parted with by their agents, and from destroying or parting with all accounts, letters, and writings which have passed between any of the parties in this bill mentioned; and that said Ellicott may be enjoined and strictly prohibited from destroying any letters, accounts, contracts, or writings of any kind which have been received by him from
15 Dull, Wiley & Andrews, Dull & Wiley, William M. Wiley, or his representative, James J. Dull, Samuel M. Shoemaker, or R. Snowden Andrews, or copies of any letters written by him to any of them; and that the National Mechanics' Bank of Baltimore may be enjoined from allowing the notes aforesaid now in its possession to be presented for payment and protested for non-payment, and from parting with the possession thereof to any person; and that your orator may have such further relief as the rules of equity may require:

May it please your honor to grant to your orator the writ of subpœna, to be addressed to the said John Ellicott and Samuel M. Shoemaker, of Baltimore city, The Canton Company of Baltimore, and The

National Mechanics' Bank of Baltimore, commanding them to be and appear in this honorable court, by a day to be named, to answer the premises and abide by and perform such decree as may be passed in the premises, and also that notice may be given to said James J. Dull and Jacob C. Bamberger, by publication, warning them to appear in this court by a certain time and show cause, if any they have, why the relief prayed should not be granted; and also the writ of injunction, directed to the National Mechanics' Bank of Baltimore, enjoining and prohibiting it from presenting for payment and protesting for non-payment the two notes drawn by your orator, which will be due and payable on the 10th of February, 1879, one for $14,000 and one for $993, and from parting with the possession thereof to any one; and that said Shoemaker, Dull
16 and Ellicott, their attorneys and agents, may be enjoined from issuing any execution on said judgment and from bringing suit on the same or on said notes or contract of guaranty, and from negotiating or parting with the said promissory notes in any manner, or allowing them to be negotiated or parted with in any manner by any of their agents or servants, and from destroying, altering, or parting with any letters, copies of letters, accounts, or copies thereof, paper-writings of whatsoever kind, or checks, drafts, or notes which have passed between any of them, or between any of them and said firms of Dull, Wiley & Andrews, Dull and Wiley, the personal representatives of William M. Wiley, William M. Wiley or R. Snowden Andrews, and from destroying or parting with any books of account or check-books which related to the said construction work, or the moneys received from your orator for said work, or to any accounts between any or all of the parties above mentioned.

And as in duty bound, &c.

WILLIAM A. FISHER,
Solicitor for Complainant.

STATE OF MARYLAND, *Baltimore City,* } *ss:*

This 8th day of February, A. D. 1879, before the subscriber, a justice of the peace of the State of Maryland, in and for Balti-
17 more city, personally appeared William G. Harrison, the president of the Union and Railroad Company of Baltimore, made oath in due form af law that the matters and facts stated in the aforegoing bill are true to the best of his knowledge, information, and belief.

J. HOWARD, *J. P.*

Whereupon the court passed and filed in said cause the following order, to wit:

In the Circuit Court of Baltimore City.

Let the injunctions issue, as prayed, against the National Mechanics' Bank of Baltimore upon the complainant depositing with the clerk the sum of $14,993, and also against the other parties, as prayed, upon the complainant filing a bond, in the usual form, with sure-

ties, to be approved by the clerk, in the penalty of thirty thousand dollars.

Balto., 10th Feb'y, 1879.

ROBERT GILMOR.

10th February, 1879, certified check for the sum of fourteen thousand nine hundred and ninety-three $\frac{14}{100}$ dollars ($14,993.14) brought into court by complainant and deposited in the Marine Bank to the credit of the cause.

Whereupon injunction issued accordingly, as prayed, in form following, to wit:

[s. s.] The State of Maryland to The National Mechanics' Bank of Baltimore, of Baltimore city, Greeting:

18 Whereas The Union Railroad Company of Baltimore has exhibited to us in our circuit court of Baltimore city its bill of complaint for relief in equity and for an injunction to restrain you, the said The National Mechanics' Bank of Baltimore, from presenting for payment and protesting for non-payment two notes drawn by the complainant and due on the 7th–10th of February, 1879, one for the sum of $14,000, and one for $993.14, or about said sums, and now in your custody, and from parting with the possession thereof until the matter can be heard and determined in equity:

Now, therefore, these are to command and strictly to enjoin and prohibit you, the said The National Mechanics' Bank of Baltimore, from doing as above recited until the further order of our said court in the premises.

Witness the Honorable George Wm. Brown, chief judge of the supreme bench of Baltimore city, the 13th day of January, 1879.

Issued the 10th day February, 1879.

JAMES R. BREWER, *Clerk.*

And the sheriff of Baltimore city aforesaid, to whom said injunction was delivered to be served, made return thereof to the court here thus endorsed, to wit:

"Injunction served on The National Mechanics' Bank of Baltimore by service on Robert T. Baldwin, president, on 10th day of February, 1879, at 1.16 o'clock p. m., in presence of John Kelly.

"PHILIP M. SNOWDEN, *Sheriff.*"

19 And thereupon, to wit, on the said tenth day of February, A. D. 1879, the following approved injunction bond was filed in said cause, to wit:

Know all men by these presents — the Union Railroad Company of Baltimore, Charles J. Baker, and Benjamin Whitely, of the city of Baltimore and State of Maryland, are held and firmly bound unto the State of Maryland in the full and just sum of thirty thousand dollars, current money, to be paid to the said State of Maryland or its certain attorney; to which payment, well and truly to be made and done, we bind ourselves and each of us, our and each of our

heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of February, in the year of our Lord one thousand eight hundred and seventy-nine, and with the seal of the Union Railroad Company of Baltimore, and subscribed by its president.

Whereas by an order of the circuit court of Baltimore city, passed in a cause wherein the said The Union Railroad Company of Baltimore, complainant, and James J. Dull and others, defendants, an injunction is about to issue to restrain the said defendants as prayed in the bill in said cause exhibited, upon the complainant filing a bond with security in the above penalty:

Now, the condition of the above obligation is such that if the said complainant shall do and prosecute the said writ of injunction with effect and satisfy and save harmless the said defendants if the same be not prosecuted with effect, and in such case pay all costs and damages that may be occasioned by the issuing thereof, and
20 shall in all things obey, abide by, perform, and fulfill such decree and order as shall be made in the premises, then the above obligation to be void; otherwise of full force and virtue.

[Seal of the Union R. R. Co. of Balto., Md.]

WM. G. HARRISON,
Pres't Union R. R. Co.
CHARLES J. BAKER. [SEAL.]
BEMJ'N WHITELY. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. C. WRENSHALL.

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that on this tenth day of February, 1879, personally appeared before me, the subscriber, a justice of the peace of said State in and for said —, John C. Wrenshall and made oath on the Holy Evangely of Almighty God that he knows the pecuniary circumstances of the within-named sureties, and that they are worth the amount of the penalty set forth in the within bond over and above their just debts and liabilities.

J. HOWARD, *J. P.*

Which said bond is thus endorsed, to wit:

"Bond approved. James R. Brewer, clerk."

21 Whereupon injunction issued accordingly as prayed, in form following, to wit:

[s. s.] The State of Maryland to John Ellicott, Samuel W. Shoemaker and James J. Dull:

Whereas the Union Railroad Company of Baltimore has exhibited to us in our circuit court of Baltimore city its bill of complaint for relief in equity and for an injunction to restrain you, the said

John Ellicott, Samuel M. Shoemaker, and James J. Dull, you and each of you, your and each of your agents, servants, and attorneys, from issuing any execution on a judgment of said Dull against the complainant in the Baltimore city court, and from bringing suit on the same and upon five notes drawn by the complainant, one due 10th February, 1879, for $14,000; another due same day for $993.14; another due 7th–10th February, 1880, for $18,562.15; another due 7th–10th August, 1879, for $556.86; another due February 7th and 10th, 1880, for $566.14, or upon the contract of guaranty of said notes by the Canton Co. of Baltimore, or from negotiating or parting with the said promissory notes in any manner or allowing them to be negotiated or parted with in any manner by any of their agents or servants, and from destroying, altering, or parting with any letters, copies of letters, accounts, or copies thereof, paper-writings of whatsoever kind, or checks, drafts, or notes which
22 have passed between any of them or between any of them and said firms of Dull, Wiley and Andrews, Dull & Wiley, the personal representatives of William M. Wiley, said William M. Wiley or R. Snowden Andrews, and from destroying or parting — any books of account or check-books which related to the said construction work or moneys received from the complainant, or to any accounts between any or all of the parties above mentioned, until the matter can be heard and determined in equity:

Now, therefore, these are to command and strictly to enjoin and prohibit you, the said John Ellicott, Samuel M. Shoemaker, and James J. Dull, you and each of you, your and each of your agents, servants, and attorneys, from doing as above recited until the further order of our said court in the premises.

Witness the Honorable George Wm. Brown, chief judge of the supreme bench of Baltimore city, the 13th day of January, 1879.

Issued the 10th day of February, 1879.

JAMES R. BREWER, *Clerk.*

And the sheriff of Baltimore city aforesaid, to whom the injunction last aforesaid was delivered to be served, made return thereof to the court here thus endorsed, to wit:

"Injunction served on John Ellicott on 10th February, 1879, at 2.45 o'clock p. m., in presence of E. B. Mercer.
23 Also injunction served on Samuel M. Shoemaker on 15th February, 1879, at 5 o'clock p. m., in presence of Geo. Roseman.

Non est, James J. Dull.

PHILIP M. SNOWDEN, *Sheriff.*"

Whereupon also subpœna issued as prayed, in form following, to wit:

The State of Maryland to John Ellicott, Samuel M. Shoe-
[s. s.] maker, the Canton Company of Baltimore, and the National Mechanics' Bank of Baltimore, of Raltimore city, Greeting:

We command and enjoin you that, all excuses set aside, you be in your person before the circuit court of Baltimore city, at the

court-house in said city, on the second Monday of March next, to answer the complaint of the Union Railroad Company of Baltimore against you in said court exhibited. Hereof fail not as you will answer the contrary at your peril.

Witness the Honorable George Wm. Brown, chief judge of the supreme bench of Baltimore city, the 13th day of January, 1879.

Issued the 10th day of February, in the year 1879.

JAMES R. BREWER, *Clerk.*

24 And the sheriff of Baltimore city, aforesaid, to whom the said subpœna was delivered to be served, made return thereof to the court here thus endorsed, to wit:

"Summoned John Ellicott, Samuel M. Shoemaker, the Canton Company of Baltimore by service on Walter B. Brooks, president; the National Mechanics' Bank of Baltimore by service on Robert Baldwin, pres'd't.

"P. M. SNOWDEN, *Sheriff.*

And afterwards, to wit, on the fifteenth day of February, A. D. 1879, the complainant aforesaid, by his said solicitor, filed in court here in said cause the following "transcript of record from the Baltimore city court," to wit:

STATE OF MARYLAND, }
City of Baltimore, } *sct:*

At a session of the Baltimore city court, in the eighth judicial circuit of the State of Maryland, begun and held at the court-house in the city of Baltimore, in and for the city aforesaid, on the second Monday of May (being the tenth day of the same month), in the year of our Lord one thousand eight hundred and seventy-five.

Present: The Honorable George Wm. Brown, associate judge of the supreme bench of Baltimore city, assigned to and presiding in the Baltimore city court; Augustus Albert, Esq., sheriff; N. C. Robertson, clerk.

25 Among other were the following proceedings, to wit:

JAMES J. DULL, Surviving Partner of William M. Wiley, Plaintiff,

vs.

THE UNION RAILROAD COMPANY OF BALTIMORE, Defendant.

Be it remembered that heretofore, to wit, on the tenth day of July, in the year of our Lord one thousand eight hundred and seventy-five, the said James J. Dull, surviving partner of William M. Wiley, by Messrs. Machen & Gittings, his attorneys, filed in court here in said cause the following declaration, to wit:

Declaration.

BALTIMORE CITY, *To wit:*

In the Baltimore City Court.

James J. Dull, surviving partner of William M. Wiley, by Arthur W. Machen and Richard J. Gittings, his attorneys, sues the Union Railroad Company of Baltimore—

1st. For money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff and William M. Wiley, since deceased, to the defendant, a body corporate.

2nd. And for goods bargained and sold by the plaintiff and William M. Wiley, since deceased, to the defendant, a body corporate.

3rd. And for work done and materials furnished by the plaintiff and William M. Wiley, since deceased, for the defendant at the defendant's request, the defendant being a body corporate.

26 4th. And for money lent by the plaintiff and William M. Wiley, since deceased, to the defendant, a body corporate.

5th. And for money paid by the plaintiff and William M. Wiley, deceased, since that time, for the defendant, a body corporate, at its request.

6th. And for money received by the defendant for the use of the plaintiff and William M. Wiley, since deceased.

7th. And for money found to be due from the defendant, a body corporate, to the plaintiff and William M. Wiley, since deceased, on accounts stated between them.

8th. And for money found to be due from the defendant to the plaintiff on accounts stated between them.

9th. And for the defendant's use, by the permission of the plaintiff and the said William M. Wiley, of lands of the plaintiff and said Wiley.

A. W. MACHEN & R. J. GITTINGS,
Attorneys for Plaintiff.

Upon which declaration is the following endorsement, to wit:

Mr. Robertson:

Docket this case by consent as an original to January term, 1875, and put it upon the trial docket of May term, 1875.

MACHEN & GITTINGS,
Attorneys for Pl'ff.
WILLIAM A. FISHER,
For Defendant.

27 It is agreed that the defendant be treated as having pleaded that "it was never indebted, as alleged," on the day that this suit is docketed.

WILLIAM A. FISHER,
For Defendant.
MACHEN & GITTINGS,
For Plaintiff.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by order of the court here thereon, is continued from term to term until the second Monday of September, A. D. 1876.

At which said second Monday of September, in the year last aforesaid, come again into court here the parties aforesaid, by their attorneys aforesaid.

And thereupon, at the said September term, to wit, on the 6th day of November, in the year last aforesaid, the said plaintiff, by his attorneys aforesaid, by leave of the court here first had and obtained, declared anew against the said defendant, The Union Railroad Company of Baltimore, in form following, to wit:

BALTIMORE CITY, *To wit:*

James J. Dull, surviving partner of William M. Wiley, by Arthur W. Machen and Richard J. Gittings, his attorneys, sues the Union Railroad Company of Baltimore—

1st. For money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff and William M. Wiley, since deceased, to the defendant, a body corporate.

28 2d. And for goods bargained and sold by the plaintiff and William M. Wiley, since deceased, to the defendant, a body corporate.

3d. And for work done and materials provided by the plaintiff and William M. Wiley, since deceased, for the defendant at the defendant's request, the defendant being a body corporate.

4th. And for money lent by the plaintiff and William M. Wiley, since deceased, to the defendant, a body corporate.

5th. And for money paid by the plaintiff and William M. Wiley, deceased, since that time, for the defendant, a body corporate, at its request.

6th. And for money received by the defendant for the use of the plaintiff and William M. Wiley, since deceased.

7th. And for money found to be due from the defendant, a body corporate, to the plaintiff and William M. Wiley, since deceased, on accounts stated between them.

8th. And for money found to be due from the defendant to the plaintiff on accounts stated between them.

9th. And for the defendant's use, by the permission of the plaintiff and the said William M. Wiley, since deceased, of the lands of the plaintiff and said Wiley.

And the plaintiff claims therefor $150,000.

A. M. MACHEN, R. J. GITTINGS,
Attorneys for Plaintiff.

29 And afterwards, at the same, September, term, to wit, on the 6th day of November, A. D. 1876, the said Union Railroad Company of Baltimore, by its attorneys aforesaid, filed in the court here in said cause the following plea to the amended declaration, to wit:

In the Baltimore City Court.

JAMES J. DULL, Surviving Partner of William M. Wiley,
vs.
THE UNION RAILROAD COMPANY OF BALTIMORE.

The defendant, by its attorneys, Marshall & Fisher, for plea to the said amended declaration of the plaintiff says that the defendant never was indebted as alleged.

MARSHALL & FISHER,
For Defendant.

And afterwards, at the same, September, term, to wit, on the 6th day of November, in the year aforesaid, the following agreement of counsel was filed, to wit:

In the Baltimore City Court.

JAMES J. DULL, Surviving Partner of William M. Wiley,
vs.
THE UNION RAILROAD COMPANY OF BALTIMORE.

It is agreed that errors in pleading are waived on both sides in this case.

MARSHALL & FISHER,
For Defendant.
MACHEN & GITTINGS,
For Plaintiff.

30 And afterwards, at the same, September, term, to wit, on the 6th day of November, in the year last aforesaid, the following agreement, articles of agreement, and supplementary agreements were filed, to wit:

This agreement, made this twentieth day of December, in the year eighteen hundred and seventy-five, between James J. Dull, surviving partner of William M. Wiley, of the first part, and the Union Railroad Company of Baltimore, of the other part.

Whereas, on or about the first day of May, A. D. 1871, a certain contract in writing of that date was made and entered into by and between James J. Dull, William M. Wiley, and R. Snowden Andrews, of the first part, and the Union Railroad Company aforesaid, of the second part, a copy whereof is hereto annexed as part of this agreement; and afterwards, on or about the sixth day of July, A. D. 1871, an agreement supplemental to the aforesaid contract was made and entered into by and between the same parties, a copy of which said supplemental agreement is also annexed hereto as part of this agreement;

And whereas afterwards the said R. Snowden Andrews, with the consent of the said railroad company, assigned and released all his interest, part, and share in the said contract and supplemental agreement, and the rights and obligations thereby given or imposed to the said James J. Dull and William M. Wiley, who thereby became sole contracting parties of the first part therein or thereto;

And whereas the said James J. Dull and William M. Wiley, contractors as aforesaid, proceeded with the works mentioned
31 and contemplated in the said contract and supplemental agreement, and the same have been finished and certain payments from time to time on account thereof by the said railroad company; and the said Dull and Wiley claimed, and the said Dull now claims, that a large balance remains due the said Dull and Wiley, or to said Dull as such surviving partner, for and on account of such works;

And whereas questions arose between the said Dull and Wiley, of the one part, and the said railroad company, of the other part, and still exist between the said Dull (surviving partner as aforesaid) and the said railroad company as to several matters connected with the construction of the said tunnel and railroad mentioned in said contract & supplemental agreement, and the compensation proper to be paid by the said railroad company to the said Dull, and Wiley in his lifetime, and since his death to the said Dull, as his surviving partner, for work and labor performed and materials provided or furnished by said contractors in and about the works contemplated and provided for in and by the said contract and supplemental agreement;

And whereas, amongst and in addition to other claims of the said Dull and Wiley, they claimed and the said Dull now claims to be entitled to be paid by the said railroad company for certain stone belonging to them, the said Dull and Wiley, and used by the said railroad company in manner and for purposes not provided for in said contract and supplemental agreement, and also for other materials furnished and work done beyond, outside of, or in addition to what was required in said contract and supplemental agreement in
32 consequence of change of plan, breaks for which the contractors or parties of the first part aforesaid were not responsible or otherwise;

And whereas the said railroad company claimed that the said contractors failed to construct and finish the said works in a proper, substantial, and workmanlike manner to the satisfaction and acceptance of the chief engineer of the said company, and agreeably to the directions of said chief engineer or his assistant in charge of the work for the time being, and within the time stipulated, and that losses have occurred to said company by reason of such failures on the part of said contractors, and that injuries have occurred to lands and improvements along the line of the said tunnel by reason of the negligence and want of due care on the part of the contractors, for which the said railroad company has been made liable (and for which said company claims to be entitled to hold the said contractors responsible, apart from and independently of the particular covenant hereinafter mentioned), and other matters in difference have arisen between the parties, and the said company claims that it has, in fact, fully paid the said contractors, after the deduction of such claims on its part against them, and that it is entitled to recover from the said Dull the balance of such losses and damages;

And whereas the said William M. Wiley, since the finishing of

said works, has died, whereby all causes of action and claims under said contract and supplemental agreement, and for work done, and for stone and other materials furnished by the said Dull and Wiley to said railroad company have survived to and devolved upon said Dull;

33 And whereas the said James J. Dull and The Union Railroad Company of Baltimore have mutually agreed to refer and submit all the matters in difference between them in the premises and all claims and demands of the said Dull, surviving partner of said Wiley, against said railroad company and of said railroad company against said Dull to the arbitrament of indifferent persons, to be chosen as herein provided:

Now, these presents witness that the said parties hereto do hereby mutually agree and covenant as follows—that is to say, that each of the said parties shall nominate and appoint one disinterested person, not a lawyer, and not now or heretofore in the employ of the party nominating him, nor, if appointed by the said railroad company, a stockholder therein or in the Canton Company, and the said two persons so nominated and appointed shall forthwith proceed to select and appoint some disinterested third person, who shall not be a lawyer nor a civil engineer by profession, it being understood, however, that the said last-mentioned ground of disqualification—that is to say, from professional character as civil engineer, is to apply only to such third arbitrator, and not to the first two to be directly nominated by the parties hereto as aforesaid; and the said three persons or arbitrators so nominated, chosen, and appointed shall proceed, as speedily as may be convenient, to arbitrate and determine all the matters in difference between the parties hereto in the premises, and to award and determine what sum of money

34 shall be paid by the Union Railroad Company of Baltimore to the said James J. Dull, surviving partner of the said William M. Wiley, or by the said Dull to the said railroad company, and their award, or the award of a majority of them, shall be final and conclusive in the premises.

And it is hereby further agreed that the action heretofore docketed in the Baltimore city court between the said James J. Dull, surviving partner of William M. Wiley, as plaintiff, and The Union Railroad Company of Baltimore aforesaid, as defendant, shall, by rule of court, be submitted and referred to the award and arbitrament of the said three arbitrators, whose award, or the award of a majority of them, in the premises shall be returned to said court, to the end that judgment may be given therein in accordance with the provisions of article VII of the Maryland Code of Public General Laws.

And it is further agreed that as to the true construction, meaning, and extent of the covenants in the said supplemental agreement contained on the part of the contractors to indemnify the said railroad company from and against actions, damages, and expenses by reason of damage to certain houses or contents, the award of Archibald Sterling, Jr., Esquire, to whom such question of construction has been referred by the parties hereto, shall be accepted and respected as final and conclusive.

In testimony whereof the said James J. Dull has set his hand and affixed his seal and The Union Railroad Company of Balti-
35 more aforesaid has caused its corporate seal, attested by the signature of its president, to be affixed hereto on the day and year first above written.

J. J. DULL. [SEAL.]

[Seal of Union R. R. Co. of Balto., 1867.]

WM. G. HARRISON,
Pres't Union R. R. Co.

Pursuant to the above agreement the said James J. Dull hereby nominates and appoints Henry Tyson as arbitrator, nominated on his part as therein provided, and the Union Railroad Company of Baltimore aforesaid, hereby nominates and appoints Robert K. Martin as its arbitrator, nominated on its part as therein provided.

In witness whereof the said James J. Dull has hereto set his hand and seal and the said Union Railroad Company of Baltimore has caused it corporate seal, attested by the signature of its president, to be hereto affixed on this — day of February, A. D. 1876.

J. J. DULL. [SEAL.]

[Seal of Union R. Co. of Balto, 1867.]

WM. G. HARRISON,
Pres't U. R. R. Co.

Articles of agreement, made and concluded this first day of May, in the year of our Lord eighteen hundred and seventy-one, by and between James J. Dull, William M. Wiley, and R. Snowden Andrews, of the first part, and the Union Railroad Company, of the second part.

36 Witnesseth: That for and in consideration of the payments and covenants hereinafter mentioned to be made and performed by the said Union Railroad Company, the said party of the first part do hereby covenant and agree to construct and finish in the most substantial and workmanlike manner, to the satisfaction and acceptance of the chief engineer of the said Union railroad, all the graduation and masonry of section No. 1 of said railroad, including a tunnel under the bed of Hoffman street, extending from west side of Greenmont avenue to east side of Bond street, in city of Baltimore, and such other work connected therewith as may be necessary to finish the said section in accordance with the following specifications, so far as they may be applicable, and agreeably to the directions of the said chief engineer or his assistant in charge of the said work for the time being, which may be given from time to time during the progress of the work, and to complete the same on or before the first day of January, eighteen hundred and seventy-three, it being expressly agreed that the time herein stipulated shall be of the essence of this contract:

Specifications.

1. Graduation: Under this head will be included all clearing and grubbing, and all excavations and embankments required for the

formation of the road-bed, or in any way connected with or incident to the construction of the same.

2. The clearing shall be of a width not less than sixty-six
37 feet, and as much more as the depth of cut or fill may require, and in every case shall extend ten feet beyond the slope-stakes. In fillings of one and a half feet or less the trees and stumps must be grubbed, and in other cases they must be cut close to the surface of the earth.

3. The road will be graded for a double track throughout, and in conformity with such breadths, depths, and slopes of cutting and filling as may be determined by the engineer.

4. The excavations will be divided into three kinds, viz., earth, loose rock, and solid rock. Under the head of earth will be included clay, sand, gravel, loam, and all other matters of an earthy kind, however hard, stiff, or compact, and all boulders containing less than three cubic feet. Under the name of loose rock will be included all stone and detached rock found in separate masses, containing not less than three cubic feet nor more than one cubic yard; also all slate or other rock soft or loose enough to be removed without blasting, although blasting may be occasionally resorted to. By solid rock will be understood all rock found in masses containing upwards of one cubic yard and which can be best removed by blasting. The bids will be made separately for each kind of material as just described.

5. Such ditches shall be dug within or without the limits of the road, as the engineer may direct.

6. Materials necessarily wasted from the cuttings shall be deposited in the vicinity of the road, according to the directions of the engineer.

38 7. Materials required for embankment, and not supplied by the excavations within the line of the road, shall be obtained from the places and in the manner directed by the engineer.

8. The road shall be secured against damage from all water-courses in the vicinity thereof or in contact therewith by building or facing the embankment with stone, or by widening the existing or excavating new channels, or in such other manner as the engineer may direct.

9. Commodious passing places for all public and private roads crossing or in contact with or adjacent to said railroad shall be opened and kept in good condition, and sufficient fences shall be provided and maintained for the preservation of all growing crops by the contractor.

10. The contractor, when directed by the engineer, shall lay aside for ballast for the rail tracks, in such places as may be pointed out, any excavated rock or stone, allowance being made, according to the judgment of said engineer, for such material as may be required to supply any deficiency in the embankment thereby occasioned.

11. The distribution of materials directed by the engineer must be strictly adhered to.

12. The excavation and embankment will be paid for separately, the price of excavation being intended to pay for the removal of all

material found within the limits and above the grade of the road, or taken from new channels cut for streams or from ground excavated for roads, or for obtaining embankment for other purposes outside of said limits, the price of embankment being intended to pay for the supply of all materials required under the grade of said road, or deposited in spirl banks. It will be understood, therefore, that the excavation price is designed to pay for the excavation and loading of the material and the embankment price to pay for its transportation only.

13. All material will be measured before its removal. All embankments shall be made in layers of such thickness as the engineer may prescribe, and, in completing them to the proper grade, such allowance for shrinkage as he may think necessary shall be made.

14. All falls or slides from the roofs or sides of tunnels of open cuttings shall be paid for at the prices of the material which they most nearly resemble, in the judgment of the engineer.

15. The price bid per cubic yard will cover clearing, grubbing, and all other expenses whatever incident to the work.

16. Persons contracting with the company for any other work shall be permitted to take materials of any kind wanted for said work from the part of the road herein designated and to haul them over the same, said persons being responsible for any damage the removal of said material may occasion to the parties engaged in graduating said part of the road.

17. The contractor, before commencing work and immediately after signing his contract, if required by the engineer, shall open and maintain a good and safe road for passage on horseback through the whole length of his work.

18. Tunnel: This will be made in the form laid down in plan, curved at the sides and arched overhead, with an inverted segment at the bottom. The entire tunnel will be arched with brick and stone, or either, laid in cement, and to have a rectangular stone drain in the bottom, as shown.

The tunnel will be carefully cut out to the lines of the section prescribed by the engineer, and the cost of supporting the roof and sides, when timber-propping is required during the progress of the work and until its completion, shall be borne by the contractor without extra compensation. For all material that may fall, or be removed in anticipation of falling, from the roof and sides of the tunnel outside of the section established by the engineer, such price shall be paid the contractor as the engineer may fix, and for all that may be left unexcavated within said section such deduction shall be made as he may determine. If the roof and sides should be sufficiently solid, in the opinion of the engineer, to sustain themselves, timbering will be dispensed with; the width, height, and general figure of section of tunnel, as well as the mode of supporting the roof and sides, will be varied by the engineer as the circumstances of each particular case may seem to require. If, in the judgment of the engineer, the tunnel shall require to be arched in whole or in part with brick or stone masonry during the progress of its excavation, the party of the first part shall do the necessary arching

41 and also construct the masonry of the portals or facade, if called upon to do so by the engineer, at the price hereafter named. If shafts for ventilation, drainage, or the removal of material are required, they shall be excavated of the form and size and in the position indicated by the engineer, whose directions in relation to the mode of supporting the insecure portions of the shaft by cribbing will be strictly adhered to, the expense of such cribbing being borne by the party of the first part.

A portion or portions of the tunnel may be constructed by removing, as a thorough cut, all materials when and in which event the proper arching, as per plan, will be constructed and the materials so removed replaced over said arching strictly in accordance with the directions of the engineer as to packing, &c. All materials so removed will be paid for by the cubic yard, first, for removal, and next, for replacing. Separate bids will be received for each.

For all regular tunnel-work bids will be received for each cubic yard, and for all stone-work connected with arching by the cubic yard, and for all brick-work by the cubic yard. The company will furnish all cement and sand.

Masonry will be classed under the following heads:

1. Culverts, embracing all angular openings constructed without centering.

2. Bridges, embracing all openings of more than eight-feet span.

42 3. Support walls for sustaining embankments lengthwise to the road.

1st. Culvert masonry: All rectangular culverts, whether covered or open, will be built dry unless otherwise ordered. They will be paved with stone set on edge, breaking joints and extending quite under the abutment walls. At each end of the culvert there will be an apron-wall of suitable depth. The stone used shall be hard and durable, of good size, well bedded, all the joints well broken; the top courses to be not less than eight inches thick, to show a stretcher and header alternately; the headers, where they do not run through the wall, to lap with each other at least six inches at their inner ends; both headers and stretchers to be not less than a foot wide and at least as wide as high. The covering stones of close culverts to be sound and strong, and lapping at least nine inches on each wall.

Gothic culverts will be built in all respects like rectangular culverts excepting in the covering stone, which shall project in courses, meeting at the top of the opening, and to be composed of stones of such dimensions as will give them due support from the courses underneath, above, and behind them.

2nd. Bridges: The foundation to be placed upon solid rock, timber, or other material as may be directed by the engineer, and protected from the effects of currents by sheet piling, or in such other manner as he may determine. They shall be built of the best description of ranged rock-work; the face stone to be squared,

43 jointed, and bedded, and laid in courses not less than twelve nor exceeding twenty inches in thickness, decreasing from bottom to top of the walls. The stretchers to be not less than three

feet in length, to have at least sixteen inches bed for a twelve-inch course, and for all thicker courses at least as much bed as height. The headers to be not less size than stretchers, and to hold their size from the face back; they shall occupy at least one-fifth of the whole face of the wall, and be evenly distributed over it, alternately with each other in the contiguous courses; their disposition in the back of the wall will be similar, but they will not occupy more than one-eighth of the whole back.

They shall run through the wall or interlock, or be connected in the heart of it, as already described. The stone in the heart of the walls shall be as well bedded and bonded as those in the face, and in this character of ranged work the stones shall be of the same size with those of the face and back, so as to carry the course evenly quite through the wall. The ring shall be left rough on the face, except a square draft of 1½ inches around each stone; no projection of more than three inches from the face of the wall will be allowed. The arch-stone of all bridges of this class shall be accurately cut and carefully laid, with a thoroughly good bond lengthwise of the arch. The coping, and also the string courses, if any, shall be neatly hammer-dressed and well squared and laid with the best beds and joints, and the coping either dowelled or
44 clamped, as may be decided by the engineer. All bridges of this class shall be laid in full mortar or grouted, as may be directed, the mortar to be made with common lime or cement for such different portions of the work as may be indicated by the engineer. The lime and cement materials of the mortar to be furnished by the railroad company, and when delivered at the site of the work to be safely kept and used in the work by the contractor without charge for the labor of storing, handling, and applying them. All other materials to be furnished by the contractor.

3rd. Support walls: To be built of substantial dry rubble masonry.

Brick-work: Where bricks are used they shall be made of the best clay, well tempered, moulded, and burnt. The sizes after burning to be nine inches long, four and a quarter inches wide, and two and a half inches thick. They shall be laid in the best hydraulic cement mortar, grouted full every three courses, and made with such proportions of cement and sand as the engineer may direct; the materials for the mortar to be furnished by the railroad company in the manner described in the case of stone-work. The joints to be of such thickness and the bond to be old English or Flemish, or such other character as the engineer may prescribe either for the walls or arches, and no bats, cracked or broken brick to be used in the work.

The quality of the stone or brick of which the masonry shall be built must be well suited to the kind of structure in which it
45 is used according to the judgment of the engineer. All masonry, whether of stone or brick, to be estimated and paid for by the cubic yard.

The prices per yard will include the cost of furnishing all materials (except those of lime and cement that may be used), and of

foundation, scaffolding, centering, and all other expenses necessary to the completion of the masonry or brick-work according to the plans, and the contractor shall be at all risks from water and other casualties.

4th. Ballast: This shall be of hard, durable stone, broken to pass through a three-inch ring, and placed on the bed of the road, when graded, in the following manner: A continuous layer of stone so broken and evenly spread and of a width at the bottom of twenty-two feet, and top of twenty feet, and depth of nine inches, placed parallel with centre line of road.

5th. Cross-ties to be of sound white oak, rock oak, chestnut oak, or second-growth chestnut, eight feet long, hewn on two sides to a thickness of seven inches, both faces being not less than six inches wide, to be delivered with the bark removed in piles of fifty, each one hundred feet apart.

General Conditions Applicable lo Both Graduation, Masonry, Ballast, and Cross-tics.

1. The quantities and disposition of excavation, embankment, and masonry may be changed during the progress of the work, at the pleasure of the engineer, by alterations in the grades, curves, or plans of any part of the work, and the calculations of quantities will be
46 made anew for final settlement with the contractor, it being understood that if by such changes the work is made more or less expensive to the contractor than the plans and statements furnished him by the engineer, and on which he made his proposal, would have required, he shall have such allowances or deductions therefor as the engineer may in his own judgment consider just.

2. The use of ardent spirits upon the work or in the boarding-houses or other tenements occupied by the contractor, his assistants, and hands is strictly forbidden, and, upon the requisition of the engineer, the contractor shall discharge any one under his control who uses them or is instrumental in any way in their use by any person employed upon or connected with the work.

3. Strict discipline and order among the workmen, both while on and off the line, must be enforced by the contractor, who shall discharge from the work any person in his employ upon the requisition of the engineer.

4. The contractor shall not let or transfer his contract, or any part of it, without the written consent of the chief engineer.

5. The contractor, upon being so directed by the engineer, shall remove and rebuild or make good without charge any work which the latter may consider to be defectively executed.

6. The contractor shall commence, prosecute, and complete the work in all its parts under the directions of the engineer, who
47 shall have power to direct the application of the force to any portion or portions thereof he may indicate, to change the point of beginning and ending of section, and to order the increase or diminish the amount of said force at his pleasure.

7. Nothing short of absolute assignment of his contract, with the

consent thereto of the chief engineer written upon the articles of agreement, shall release the contractor from the duty of giving his personal superintendence to the work or discharge him from responsibility for its execution according to the contract.

7. Whenever in this contract the word "engineer" is used it is to be understood as applying to the local or resident engineer having charge of the particular work for the time being, except in those cases wherein the chief engineer is expressly mentioned.

9. The contractor must carefully preserve the bench-marks, stakes, and levels given by the engineer, and, in case of neglect in this particular, will be charged with the resulting expense.

In consideration whereof the said Union Railroad Company doth hereby agree with the said party of the first part that the said company shall and will, for doing and performing the work aforesaid in the manner aforesaid, well and truly pay or cause to be paid to the said party of the first part, their executors or administrators, the following prices, viz:

48 Tunnel work:	$ Cts.
Sinking shaft, per cubic yard	8 00
Drifting or boring, per cubic yard	5 00
Excavation in open cut under Hoffman St., solid rock, per cubic yard	1 50
Excavation in open cut under Hoffman St., all other material, per cubic yard	60
Material replaced in open cut of tunnel, per cubic yard	35
Stone masonry or lining, per cubic yard	9 00
Brick masonry or lining, " "	9 50
Packing over arch, " "	1 25
Graduation and masonry apart from tunnel:	
Earth excavation	30
Loose rock excavation	60
Solid rock excavation	1 50
Bridge masonry	11 00
Culvert masonry	6 00
Retaining walls	9 00
Haul:	
For all material excavated, for each hundred feet hauled, per cubic yard	01¼

The above payments shall be made in the following manner—that is to say: During the progress of the work and until it is completed there shall be a monthly estimate made by the aforesaid engineer of the quantity, character, and value of the work done during the month or since the last monthly estimate, four-fifths of which value shall be paid in cash to the said parties of the first part at the office of said Union Railroad Company on or before the fif-
49 teenth day of each month; and when the said work is so completed and so accepted by the said chief engineer, there shall be a final estimate made by the engineer of the quantity, character,

and value of said work, agreeably to the terms of this agreement, when the balance appearing to be due to the said party of the first part shall be paid to them upon their giving a release, under seal, to the said Union Railroad company from all claims or demands whatsoever growing in any manner out of this agreement.

And it is expressly covenanted and agreed between the parties aforesaid that the monthly and final estimate of the engineer shall be conclusive between the parties aforesaid to this contract, the former for the time being and the latter for all time, without further recourse or appeal, the monthly estimates of the engineer being, however, subject to correction by him in any subsequent monthly or in his final estimate, for the reason that the monthly or current estimates, being merely made out as a basis for payment on account, will necessarily be only approximately correct, pains being taken, however, to make them as accurate as possible, and, if the chief engineer deems it proper at any time to revise & alter, in such manner as he may see fit, the monthly or final estimate of said engineer, then the estimate of said chief engineer shall be substituted to all intents and purposes in place of the estimate of said engineer, it being, however, wholly optional with the said chief engineer to exercise such power or revision or not; and it is further covenanted and agreed
that all extra work required and not embraced under the items
50 and prices above set out shall be done by the contractor at
the estimate of the engineer, and said engineer shall embody in each monthly estimate a bill for the same, made out as correctly as possible, for the month preceding. This bill shall be final for each month, and the acceptance of the estimate by the said contractor shall be deemed and taken as waiving any further claim for or on account of extra work done up to that time.

It is further agreed and understood that the work embraced in this contract shall be commenced within ten days from the date hereof, and prosecuted with such force as the engineer shall deem adequate to its completion within the time specified in this agreement, and if at any time the said parties of the first part shall refuse or neglect to prosecute the work with a force sufficient, in the judgment of the engineer, for its completion within the time specified, then and in that case the engineer in charge, or such other agent as the chief engineer shall designate, may proceed to employ such number of workmen, laborers, and overseers as may, in the opinion of the said chief engineer, be necessary to insure the completion of the work within the time hereinbefore limited, at such wages as he may find it necessary or expedient to pay all persons so employed, and charge over the amount so paid to the parties of the first part as so much money paid to the parties of the first part on their contract.

And it is hereby further agreed that in case the said parties of the first part shall not well and truly from time to time comply with
and perform all the terms hereinbefore stated and stipulated
51 on their part in manner and form and within the time hereinbefore mentioned, or in case it should appear to the said chief engineer that the work does not progress with sufficient speed or in a proper manner, or in case of interference with said work by

legal proceedings instituted against the parties of the first part by other parties than the said company, the said chief engineer shall have power to annul this contract, if he sees fit so to do, by serving a notice in writing upon said parties of the first part if they be upon the work to receive it, or by posting such notice upon the door of their usual dwelling or boarding house, or any public place on or near the work if they be absent therefrom, when, upon such serving of said notice, the foregoing agreement upon the part of the said company and every clause and part thereof shall become null and void, and the unpaid fifth part of the value of the whole work done shall be forfeited by the said party of the first part to the use of the said company in the nature of liquidated damages. All right of occupancy in or upon any lands or property condemned for said company, and all the rights whatever of said parties of the first part in and to any further prosecution of or interest in the work shall forthwith cease and terminate at the notice aforesaid, and the said party of the second part may contract anew for the work remaining to be done, or may employ any other person or persons to do and complete the work herein mentioned, or so much of it as may remain unfinished, as though this contract had never been made.

52 And it is further expressly agreed that the said company should at any time have the right, without fault on the part of the parties of the first part, and for any reasons whatever that may appear sufficient to said company, upon giving thirty days' notice thereof to the parties of the first part to suspend the execution of or annul this contract; in which event the said party of the first part shall be entitled to the full amount of the estimates for the work done by them up to the time of such suspension or annulment without the deduction of one-fifth hereinbefore mentioned; and such suspension or annulment shall not give to the said parties of the first part any claim for damages against the said Union Railroad Company.

And the said parties of the first part hereby further covenant and agree to and with the said party of the second part that in case it shall be determined by the chief engineer to construct any further earthworks, bridges, culverts, drains, walls, or other works not now contemplated or hereafter enumerated upon or pertaining to the said section or sections, that the said parties of the first part will perform, construct, and complete the same as though the said work had been specifically set out herein, and for the prices hereinbefore stipulated to be paid for similar kinds of work, and upon the same terms and conditions, except with regard to the time of completing the same, which is hereby agreed shall be in that case reasonably extended at the discretion of the chief engineer, when the limit fixed by him shall have the same effect as though it were inserted in this agreement.

53 And it is further agreed that where this contract shall be executed with a firm or more than one person, the said firm or persons, prior to the first estimate, shall designate in a power of attorney to be furnished by the engineer and afterwards deposited with him, some person or one of their number to receive and receipt for the current estimate, and this power they may, on notice

to the engineer, revoke or alter at their pleasure, so that some one duly authorized by them shall always have full power to draw and receipt for current monthly estimates; but this shall not extend to final estimates, at the payment of which all the individuals signing this contract, or their personal representatives, must be present.

In witness whereof the said parties of the first part have hereunto set their hands and seals and the party of the second part have caused the signature of their president and their corporate seal to be hereunto attached and attested by their secretary.

Done in duplicate on the day and year first above written.

J. J. DULL. [SEAL.]
W. M. WILEY. [SEAL.]
R. SNOWDEN ANDREWS. [SEAL.]

[Seal of Union R. R. Co. of Balto., Md., 1867.]

WM. G. HARRISON,
Pres't Union Railroad Co.

Signed, sealed, and delivered in the presence of—

J. V. EINSTEIN,
As to James J. Dull.
J. C. WENSHALL,
As to W. M. Wiley and R. Snowden Andrews.
R. S. S. HARRISON,
As to Wm. G. Harrison.

54 An agreement supplemental to an agreement made on the first day of May, in the year one thousand eight hundred and seventy one, between James J. Dull, Wm. M. Wiley, and R. Snowden Andrews, of the first part, and the Union Railroad Company, of the second part, witnesseth: That the foregoing agreement having been predicated upon the assumption that more than one-half of the tunnel under Hoffman street would be constructed by means of shafts and underground drifts, and it being deemed expedient to abandon this particular method of construction in general and substitute the plan of open-cut excavation: Now, this supplemental agreement witnesseth: That the parties of the first part, for and in consideration of the further payment hereinafter mentioned to be made by the party of the second part, do hereby agree to prosecute and complete the work of excavation under the bed of Hoffman street as an open cut from end to end of tunnel, except where legal or other difficulties may compel the resort to boring or drifting for short distances, in order to prevent serious delay in the execution of the work within the limits of time specified as of the essence of these articles of agreement.

And the party of the first part hereby also agrees to secure the slopes or sides of said open cut by such means as may be necessary to prevent any damage to all buildings and contents along line of said open cut or tunnel between said limits, and the parties of the first part, for the consideration aforesaid, covenant to indemnify and

save harmless the party of the second part for or on account
55 of and against all actions, claims, or demands, damages or costs and expenses that may be made or brought against or recovered from the party of the second part for any damage to house or contents that may arise from the construction of said open cut or tunnel between said limits.

Furthermore, the said party of the first part agrees to construct and maintain all necessary temporary bridges and passways for public use at the intersections of the several streets and roads intersected by the said open cut or tunnel.

In consideration of all which the party of the second part agrees to pay and will cause to be paid to the party of the first part the additional price of fifteen cents for each and every cubic yard of material other than solid rock necessarily excavated from open cut of tunnel under bed of Hoffman street between the west side of Greenmount avenue and east side of Bond street, making full price of this item for such open cut seventy-five cents (75) instead of sixty cents (60), as stipulated in the original agreement, the price of such material to remain unchanged, except where resort is had to open cut.

And the party of the second part also agrees to pay twenty dollars ($20) for each and every cubic yard of that portion of masonry of the tunnel known as "skewback stones," separate and distinct from all other kinds of masonry, it being understood that in all other particulars the stipulations of the original agreement remain intact and of full force.

56 In witness whereof the said parties of the first part have hereunto set their hands and seals and the party of the second part have caused the signature of their president and their corporate seal to be attached hereunto and attested by their secretary.

Done in duplicate this sixth day of July, in the year one thousand eight hundred and seventy-one.

J. J. DULL. [SEAL.]
WM. M. WILEY. [SEAL.]
R. SNOWDEN ANDREWS. [SEAL.]

[Seal of Union R. R. Co., 1768.]

WM. G. HARRISON,
President Union R. R. Co.

Witness as to Jas. J. Dull:
J. V. EINSTEIN.

Witness as to Wm. M. Wiley:
MARTIN HAHER.

Witness as to R. Snowden Andrews:
CHARLES MARSHALL.

Witness as to the signature of Wm. G. Harrison:
CHARLES E. SCHWERTZER.

This agreement made this — day of June, in the year eighteen hundred and seventy-six, between James J. Dull, surviving partner of William M. Wiley, of the first part, and the Union Railroad Company of Baltimore, of the other part.

Whereas Henry Tyson and Robert K. Martin, arbitrators heretofore nominated and appointed by said Dull and said railroad company, respectively, in pursuance of an agreement made between them, dated the twentieth day of December, 1875 (which
57 agreement is hereto annexed), have concurred in selecting and appointing H. D. Whitcomb, of the city of Richmond, in the State of Virginia, as a third arbitrator under the said agreement, as therein provided;

And whereas the said agreement contains a stipulation prohibiting the arbitrators named by the parties, respectively, from appointing as such third arbitrator any civil engineer;

And whereas the said Whitcomb is a civil engineer, and therefore would be disqualified according to the terms of said stipulation from receiving such appointment or acting thereunder;

And whereas the said James J. Dull and the Union Railroad Company of Baltimore aforesaid have mutually agreed to waive the said stipulation or restrictive provision in respect to said Whitcomb, and have consented and do consent to his appointment as such third arbitrator, notwithstanding the same:

Now, these presents witness that the said James J. Dull and the Union Railroad Company of Baltimore aforesaid do hereby ratify and confirm the said appointment of the said H. D. Whitcomb, and consent that he be the third arbitrator under the said agreement dated 20th December, 1875, and do mutually agree that he, the said Whitcomb, shall be as fully authorized and empowered to act as such arbitrator in the premises as if the said agreement had contained no disqualifying or restrictive provision applicable to him.

And the said parties hereto do hereby expressly agree that
58 the said three arbitrators, Henry Tyson, Robert K. Martin, and H. D. Whitcomb, shall proceed, as speedily as may be convenient, to arbitrate and determine all the matters in difference between the said Dull and the said railroad company in the premises, as in said former agreement provided, and so that their award, or the award of any two of them, in the premises shall be final and conclusive.

And the said James J. Dull and the Union Railroad Company of Baltimore aforesaid do hereby mutually covenant and agree that the said action now pending in the Baltimore city court, wherein the said Dull is plaintiff and the said Union Railroad Company is defendant, shall be submitted and referred by rule of said court to the award and arbitrament of the said three arbitrators hereinabove mentioned, whose award, or the award of any two of them, when given or made in the premises, shall be returned to the said court, to the end that judgment may be forthwith entered thereon according to law; and they, the said parties hereto, do hereby, respectively, authorize and direct their respective attorneys of record in the said action to cause the same to be submitted and referred accordingly.

In testimony whereof the said James J. Dull has hereto set his hand and seal and the Union Railroad Company of Baltimore aforesaid has caused its corporate seal, attested by the signature of its president, to be hereto affixed on the day and year first hereinabove named.

J. J. DULL. [SEAL.]

[Seal of Union R. R. Co. of Balto., 1867.]

WM. G. HARRISON.

59 And afterwards, at the same, September, term, to wit, on the sixth day of November, in the year last aforesaid, the following agreement of counsel was filed:

In the Baltimore City Court.

JAMES J. DULL, Surviving Partner of Wm. M. Wiley,
vs.
THE UNION RAILROAD CO. OF BALTIMORE.

It is hereby agreed in this case that the court shall pass an order referring the case to arbitration, to wit, Henry Tyson, Robert K. Martin, and H. D. Whitcomb, in accordance with the provisions of the agreement filed in the cause.

MACHEN & GITTINGS,
For Pl'ff.
MARSHALL & FISHER,
For Defendant.

And afterwards, at the same, September, term, to wit, on the sixth day of November, in the year last aforesaid, by order of the court, the case was referred to Henry Tyson, Robert K. Martin, and H. D. Whitcomb, for arbitration.

And afterwards, at the same, September, term, to wit, on the thirteenth day of December, in the year last aforesaid, the following award of the referees was filed, to wit:

60 In the Baltimore City Court.

JAMES J. DULL, Surviving Partner of Wm. M. Wiley,
vs.
THE UNION RAILROAD CO. OF BALTIMORE.

We, Henry Tyson, Robert K. Martin, and H. D. Whitcomb, having been appointed arbitrators in the above cause by the Baltimore city court, and by consent and agreement of the parties, and having given due notice to the said parties of the time and place of hearing their respective allegations and proofs, and having heard and duly considered their said allegations and proofs, do, by virtue of said submission and reference, and pursuant to the agreements of the said parties filed in said cause, hereby award and determine that the said Union Railroad Company of Baltimore is indebted to the said James J. Dull, surviving partner of William M. Wiley, the said plaintiff, in the premises, in manner and form as the said plaintiff hath de-

cleared against the said defendant, in the sum of fifty-four thousand one hundred and fifty-nine dollars and fifty cents.

And we do further award and determine that judgment for the plaintiff be entered in the said cause for the said sum of fifty-four thousand one hundred and fifty-nine dollars and fifty cents.

Given under our hands and seals this twelfth day of December, A. D. one thousand eight hundred and seventy-six.

61 HENRY TYSON. [SEAL.]
ROBERT K. MARTIN. [SEAL.]
H. D. WHITCOMB. [SEAL.]

Admission of service of copy of the above award admitted by defendant's attorneys, Messrs. Marshall & Fisher.

And afterwards, on the second Monday of January, being the eleventh day of the same month, in the year eighteen hundred and seventy-seven, come again into court here the parties aforesaid, by their attorneys aforesaid.

And thereupon, on motion of the said James J. Dull, surviving partner of William M. Wiley, by his attorney aforesaid, and it appearing to the court here that the said James J. Dull, surviving partner of William M. Wiley, hath complied with the necessary requisites as required by law in order to have judgment upon the award aforesaid:

Therefore it is considered by the court here that the said James J. Dull, surviving partner of William M. Wiley, recover against the said Union Railroad Company of Baltimore as well the sum of fifty-four thousand one hundred and fifty-nine dollars and fifty cents, the damages aforesaid, by the arbitrators in form aforesaida warded, as the sum of nine dollars and twenty cents for his costs and charges by him about his suit in this behalf laid out and expended.

MEMORANDUM.—January 11th, 1877. On motion, in open court, judgment on the award for the plaintiff for fifty-four thousand one hundred and fifty-nine dollars and fifty cents, with interest from date and costs ($54,159.50).

62 And afterwards, to wit, on the twenty-fifth day of February, A. D. 1877, the following copy of an agreement of the Canton Company of Baltimore with James J. Dull, surviving partner of William M. Wiley, was filed, to wit:

Agreement made this twenty-first day of February, A. D. 1877, by the Canton Company of Baltimore, Maryland (a body corporate), with James J. Dull, of Harrisburg, in the State of Pennsylvania, surviving partner of William M. Wiley.

Whereas the said James J. Dull, surviving partner as aforesaid, recovered a judgment in the Baltimore city court, on the 11th day of January, A. D. 1877, against the Union Railroad Company of Baltimore for the sum of fifty-four thousand one hundred and fifty-nine dollars and fifty cents ($54,159.50), with interest thereon from the said date and costs, which sum is the balance ascertained to be

STATE OF MARYLAND, } *sct:*
City of Baltimore, }

I, N. C. Robertson, clerk of the Baltimore city court, do hereby certify that the aforegoing is a full, true, and entire transcript taken from the record and proceedings of the said court in the thereinentitled cause.

In testimony whereof I hereunto set my hand and affix the seal of the Baltimore city court aforesaid on this thirteenth day of February, eighteen hundred and seventy nine.

[S. S.] N. C. ROBERTSON, *Clerk.*

And afterwards, to wit, on the tenth day of March, A. D. 1879, the following order for appearance was filed in said cause, to wit:

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

67 Mr. Brewer:

Please enter our appearance for John Ellicott and Samuel M. Shoemaker, defendants.

I. NEVITT STEELE,
MACHEN & GITTINGS.

And thereupon, to wit, on the said tenth day of March, A. D. 1879, the following order was filed in said cause, to wit:

In the Circuit Court of Baltimore City. March Term, 1879.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

Mr. Brewer:

Enter my appearance for the National Mechanics' Bank of Baltimore.

THEOS. B. HORWITZ.

And afterwards, to wit, on the thirteenth day of March, A. D. 1879, the following answer was filed in said cause, to wit:

The Separate Answer of the Canton Company of Baltimore.

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

The defendant has no knowledge of the circumstances stated in the bill of complaint, but admits the execution by it of the contract of guaranty mentioned in the bill, and submits that, if the
68 complainant shall make out the case presented by its bill the relief prayed for should be granted.

In witness of this answer the corporate seal of the defendant is hereto affixed and Walter B. Brooks, its president, hath hereto subscribed his name.

[Seal of the Canton Co. of Balto., 1879.]

WALTER B. BROOKS,
Pres't Canton Co. of Baltimore.

A. H. TAYLOR,
Solicitor for Canton Company.

And afterwards, to wit, on the thirty-first day of March, A. D. 1879, the following order of publication was passed and filed in said cause, to wit:

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

The object of this bill is to procure a decree setting aside as void, by reason of the fraud of the defendant, James J. Dull, and others, certain contracts entered into during the months of May and July, 1871, between the complainant and the defendant Dull, and others, for the construction of the railroad of the complainant, and also an arbitration contract between the complainant and said Dull and the late William M. Wiley for an arbitration, and the award, and the judgment of the Baltimore city court based upon the said
69 award, and to require the defendants, Dull, Samuel M. Shoemaker, and John Ellicott, to restore to the complainant the moneys paid by it on said judgment, and for the cancellation of the following promissory notes which were issued by complainant in settlement of said judgment and are yet unpaid—that is to say, a note of $14,000, due February 10th, 1879; another of $18,562.15, due February 10th, 1880; and three interest notes, one for $993.14, due February 10th, 1879, and one for $556.86, due August 10th, 1879, and one for $566.14, due February 10th, 1880, all drawn by the complainant; and also for an injunction against the defendants, Dull, Shoemaker, and Ellicott, to enjoin them from destroying or making away with the accounts and letters which have passed between them.

The bill states that at the time the said construction contracts were entered into the said John Ellicott was the chief assistant under Mr. Manning, the engineer of the complainant, and, by reason of Mr. Manning's absence on other work, that said Ellicott principally superintended the work connected with the letting of the construction, and that at said arbitration he was examined as a witness for said Dull, and the award was largely based upon his testimony; and that by reason of the examination of said Dull recently as a witness in a case in the circuit court of the U. S. for the eastern district of Pennsylvania it became known to the complainant, by the admission of said Dull, that the said John Ellicott, and, as complainant be-

lieves, said Shoemaker were secret partners or interested with
70 the contractors, Dull and Wiley, in the said contracts for construction, and that very large sums of money were paid to said Ellicott by his said co-contractors. The bill further alleges that all the said contracts, with the award and judgment, were fraudulently and collusively obtained and are void, and that the said Bamberger claims to be the holder of said notes due in February, 1879, but in reality holds them for said Dull.

It is thereupon ordered by the court, this 31st day of March, 1879, that the said complainant, by causing a copy of this order to be inserted in some daily newspaper published in the city of Baltimore once in each of four successive weeks before the 30th day of April, 1879, give notice to the said absent defendants, James J. Dull and Jacob C. Bamberger, of the substance and object of this bill and warn them to be and appear in this court, in person or by attorney, on or before the 4th day of August, 1879, to answer the premises and show cause, if any they have, why a decree ought not to pass as prayed.

JAMES. R. BREWER, *Clerk.*

Copy whereof issued accordingly.

And afterwards, to wit, on the third day of May, A. D. 1879, the following answer was filed in said cause, to wit:

The Separate Answer of The National Mechanics' Bank of Baltimore, One of the Defendants in the Above-entitled Case, to the Bill of Complaint against it and Others.

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE

vs.

JAMES J. DULL *et al.*

71 To the Honorable Robert Gilmor, judge of the circuit court of Baltimore city.

This defendant admits that it received for collection, on or about the eighth day of June, 1879, from J. C. Bamberger, cashier of the Mechanics' Bank of Harrisburg, Pennsylvania, two promissory notes made by "The Union Railroad Company of Baltimore," viz., one for nine hundred and ninety-three dollars and fourteen cents, and the other for fourteen thousand dollars, both dated the seventh day of February, 1877, and both payable twenty-four months thereafter.

And this defendant, further answering, says that it is a stranger to the other matters and things charged in said bill, save as appears from the allegations contained in said bill, and that it can, therefore, neither admit nor deny the same.

And this defendant prays to be hence dismissed, with its costs; and as in duty, &c.

And this defendant has caused this answer to be signed by its

president and the corporate seal of the National Mechanics' Bank of Baltimore to be hereto affixed.

[Seal of the Nat'l Mech's' Bank of Balto.]

R. T. BALDWIN,
President National Mechanics' Bank of Baltimore.

THEOS. B. HORWITZ,
Sol'r for the National Mechanics' Bank of Baltimore.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

I hereby certify that on this first day of May, 1879, before
72 me, the subscriber, a justice of the peace of said State, in and for the city aforesaid, personally appeared Charles R. Coleman, cashier of the National Mechanics' Bank of Baltimore, and made oath in due form of law that the matters and things stated in the foregoing answer are true to the best of his knowledge and belief.

JOSHUA M. MYERS, *J. P.*

And afterwards, to wit, on the seventeenth day of May, A. D. 1879, the following answer was filed in said cause, to wit:

The Answer of John Ellicott to the Bill of Complaint of the Union Railroad Company of Baltimore against Him and Other Defendants in this Court Exhibited.

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

This defendant, reserving all right and benefit of every exception and objection that may be taken to the said bill for the many errors, defects, and uncertainties thereof, for answer thereto, or to so much thereof as he is advised is material to be answered unto, answering, says he admits that, as stated in said bill, the complainant, being a body corporate, was authorized by its charter to construct — a point near the said Belvidere bridge to tide-water at Canton, and in or about the spring of 1871 advertised for proposals for the said work; that bids were made by several persons, and, among others, by William M. Wiley, James J. Dull, and R. Snowden Andrews.

73 This respondent further admits that, with the consent of the said complainant, the contract founded upon the acceptance of the proposals of one of the said bidders was made with all three of them, jointly, for the construction of the work, being the same agreement or contract, dated the first day of May, 1871, mentioned in the bill and set forth in the transcript of the record of a case in the Baltimore city court, filed by the complainant as an exhibit, and that on the 6th day of July, in the same year, the supplemental contract was made between the same parties, which is re-

ferred to in the said bill, and is also set out in the said record filed as an exhibit by the complainant, and that shortly after the execution of the said supplemental contract the said R. Snowden Andrews disposed of his interest in the said construction contract or contracts to the said Dull and Wiley, who thereby became sole contracting parties, to which change the complainant assented; that the said Dull and Wiley thereupon proceeded with the works mentioned and contemplated in the said contracts, and finally completed the same, and, as this respondent is informed and believes, payments were from time to time made on account thereof by the complainant.

Further answering, this respondent admits that after the completion of the said works a controversy existed between the said Dull and Wiley and the complainant as to the proper settlement of the accounts between them growing out of said works, and that the matters in difference, or some of them, were, under a mutual agreement entered into by the complainant and the said Dull and Wiley
74 and consummated after said Wiley's death by the said Dull, his surviving partner, referred to arbitration, and the arbitrators finally selected were, as stated in said bill, Henry Tyson, Robert K. Martin, and H. D. Whitcomb (the last chosen by said Tyson and Martin), all of whom were engineers of ability and eminence; that this respondent was called as a witness and testified before said arbitrators, but this respondent understood then and believes now that the matter to which his testimony related was comparatively unimportant, being simply the question whether a certain drawing or plan which some time during the progress of the work was hung in an office of the said railroad company was the original plan offered to the inspection of bidders before proposals were received; on behalf of the contractors it being claimed that owing to a change of plan the walls of the tunnel in actual construction were less thick and the courses of bricks in the arch fewer than was originally contemplated, and that on this account their profits were diminished; but, as this respondent is credibly informed and believes, this part of the claim of the contractors was disallowed by the arbitrators, and no damages were awarded because of any such change of plan, so that the matter of fact with regard to which this respondent testified as aforesaid was wholly immaterial and his testimony had no influence upon the award. But if the meaning of the bill be to charge that this respondent's testimony before said arbitrators, whether important and material to the issue or not, was untrue in any particular, he utterly denies the allegation, and,
75 repelling every imputation upon his veracity, asserts that all of his testimony as given was truthful and sincere. No question was asked him at said examination as to his interest in the matters in dispute; had he been interrogated in regard thereto he should have answered with entire frankness. This respondent had nothing to do with the selection of the arbitrators, or management of the case before them, nor did he attend their meetings, except when called as a witness.

This respondent, further answering, denies that the award of the said arbitrators was unjust, but upon credible information this

respondent believes, and, upon his belief says, that the same was fair, reasonable, and just.

Further answering, this respondent says it is true as stated in the said bill that Charles P. Manning was the chief engineer of the complainant at and before the time of the construction of its said tunnel and railroad; that the said Manning, having upon his hands certain unfinished professional work elsewhere, employed this respondent some time in the year 1870 to assist him more especially during the periods of his absence from Baltimore; that, while the said arrangement had the sanction of the officers of the Union Railroad Company, this respondent was not in the employ of said company, nor did he receive any compensation from it, but out of the pay received by the said Manning as chief engineer the latter agreed to pay this respondent for his services. In the capacity of such assistant to Mr. Manning, the said chief engineer, this respondent, conducted preliminary surveys, located the line of the said
76 tunnel and railroad, and was engaged about the preparation of the specifications; all of which work received the approval and adoption of the said chief engineer and was prior to the letting of the work to contractors. The said specifications so prepared were revised and approved by the said Manning, and were printed and annexed to the forms for proposals issued to all who desired to act upon the published invitation to bidders. In all the said work this respondent was actuated, and is confident said Manning was actuated, solely by regard for the interests of the said Union Railroad Company; and as the same specifications and the same information of every kind with regard to the said proposed works was given to every one who applied or made inquiries touching the same, it is manifest that in no way could this respondent, had he been so disposed, by means of his position in connection with the work, have given any undue advantage to the said Dull, Wiley and Andrews or prejudiced the said railroad company in any particular; but this respondent explicitly and absolutely denies that he gave any undue advantage or assistance of any kind whatever to the said Dull, Wiley and Andrews, or either of them, either before the letting of the work or subsequently. Some time before proposals were received, and just before the advertisement for letting, the said Manning returned to Baltimore, and thenceforward personally performed the duties of chief engineer. The said Manning was present at the opening of the bids, and in person handled the proposals, and any opinion or advice required of the company's engineer was
77 given by him and not by this respondent, whose position was entirely subordinate, and, as respects all important functions of an engineer, he was practically superseded by the said Manning upon his said return to Baltimore and full assumption of the duties of engineer to the said company. In the letting of the work to said Dull, Wiley & Andrews this respondent had no part or agency, nor was he consulted in regard thereto. The acceptance of the bid of said Dull and Wiley was made by the officers of the said railroad company, wholly uninfluenced by any opinion, advice, or suggestion of this respondent; and neither at the time of the reception of pro-

posals nor of the acceptance of the prevailing bid was this respondent interested therein in any manner whatsoever, and when the contract was awarded to the said Dull, Wiley, and Andrews this respondent stood completely indifferent to them all—as much so as to any of the other parties who put in proposals. Some time after the letting this respondent was informed by the said Samuel M. Shoemaker, who in many ways had manifested a disposition to befriend him after his return to Maryland at the termination of the civil war, that he, the said Shoemaker, was to receive one-third of any profits there might be from the contract, and that this respondent, if he pleased, might have one-half of what should so come to him, the said Shoemaker. This respondent thanked the said Shoemaker for his kindness, and accepted it without imagining that there was anything in the relation he temporarily occupied to the said chief engineer, Manning, to make it improper, or even questionable, so to do. His
78 connection with the said railroad company was of the slightest character; he was not, directly, even in its service, having been employed by Mr. Manning from considerations of personal convenience to the latter, merely to render him such assistance as he required, without any claim whatsoever upon the company, or right to exact compensation from it. It was part of the arrangement that this respondent, in undertaking said service, should not give up other business in which he was engaged, and accordingly he continued, during the time he so rendered assistance to the said Manning, to pursue as formerly the profession of civil engineer and architect, and kept an office for the purposes of such independent business at a different place from that of the Union Railroad Company and wholly disconnected with it, as was well known and understood, both by the said Manning and the officers of the said railroad company; and, even had this respondent's relation to the works of the Union Railroad Company aforesaid been of a more stable character, there was nothing in the nature of his duties to bring him in contact with the contractors or affect either their performance of their stipulated work or the measure of compensation to accrue to them for it; and in fact, within the space of a few months thereafter, the said Manning being able to devote his whole time to his office, made known to this respondent that he no longer had occasion for his services; whereupon this respondent ceased to be in his employ, and thenceforward had nothing to do with any of the operations or business of the complainant; so that his said em-
79 ployment by said Manning, which began in the fall of the year 1870, continued, as stated in the bill of complaint, only for about a year, and wholly ended nearly two years before the completion of the contract work in question.

This respondent denies that it is true, as alleged in the bill, either that the interviews with the parties proposing to make bids, the contracts founded upon the accepted bids, or the general superintendence of the work for some months from its commencement was left almost entirely to this respondent, but, on the contrary, avers that the said Manning returned from Ohio before the letting of the work, approved the specifications, was present to give all requisite

information to persons making inquiries with a view to proposals, and did give such information and performed the whole duty of chief engineer in connection with the making of the said contracts, and had the sole and exclusive superintendence of the work from the very commencement, the immediate direction thereof being devolved upon Mr. Kenly, the resident engineer, and this respondent had no charge of it whatever. This respondent gave no instructions to the contractors, made no measurements or estimates of any of their work, exercised no authority over them, and had no part at all in the construction of the said railroad and tunnel, his whole work being either preliminary to the advertisements for proposals or office work wholly unconnected with the contractors or their compensation. As already stated, it is true that, long after he had ceased to be connected or associated in any manner with
80 the engineering work of the complainant, this respondent being called to testify as to a single matter of fact, with regard to which the evidence of any eye-witness was as good as his own, namely, what drawing or plan it was which was prepared before the receipt of proposals for the information of bidders, did testify to the best of his recollection and belief in regard thereto; but the allegation of the bill that the claim of the said Dull and Wiley, or Dull as survivor, was largely based upon the supposed change of model or plan is grossly false, the truth being that the greater part by far of the claim of the contractors before said arbitrators was independent altogether of the said change of plan or any matter as to which this respondent gave testimony, and, as this respondent has been credibly informed and verily believes and therefore, answering, states the award rendered by the arbitrators was not founded in any degree on the testimony of this respondent or upon any matter of fact with regard to which he was examined.

Further answering, this respondent says that in the lifetime of the said Wiley he received from the said contractors through him, on account of his half of the said Shoemaker's share of the profits several sums of money, amounting altogether, to the best of his knowledge and recollection, to the sum of $12,400, and after his death, and subsequently to the award of said arbitrators, this respondent received from the said Dull on the same account, in a note of the said Union Railroad Company, which was subsequently paid, the sum of $1,298.14; so that the amount he has altogether received from the said con-
81 tractors or any of them is $13,698.14 (and not $18,000, as alleged in the bill), all of which this respondent received under and by virtue of the aforesaid gift of the said Shoemaker, and in no other manner, and upon no other ground or consideration whatsoever. As to the mode in which the payment of the said award was arranged or provided for between the complainant, or the Canton Company and the said Dull, this respondent has no knowledge; nor has he any knowledge as to the payments made by the complainant to the said Dull on account of the said award and judgment, further than that this respondent was paid by said Dull on account of this respondent's share of proceeds realized under said award the said sum of $1,298.14, as aforesaid. As to the alleged examination

and testimony of the said Dull in the circuit court of the United States for the eastern district of Pennsylvania this respondent has no knowledge, nor does he know anything about the said unpaid promissory notes, but he believes them to be in the possession of the said Dull.

This respondent utterly denies that he has practiced or been guilty of any fraud whatever in the premises, or that he has ever used the position he for a time had as assistant to the said Manning, or any other connection of this respondent with the complainant, or employment by or under it to the wrong or prejudice in any manner of the complainant. He further expressly denies that whilst assistant engineer as aforesaid he ever aided the said Dull, Wiley and Andrews in any manner or enabled them to obtain any improper
82 advantage, but avers that throughout his connection with the works of the complainant he acted with perfect good faith and fidelity. No agreement or contract was ever made between the said Dull, Wiley and Andrews or either of them with this respondent, nor was this respondent party to any writing with them or either of them in relation to any of the matters in question. This respondent has not in his possession or under his control any checks for money paid or intended to be paid him by the said Dull, Wiley and Andrews or any or either of them, and, to the best of his recollection, he never was paid any money by them or either of them by check. This respondent has not to his knowledge any letters received from the said Dull, Wiley and Andrews or any or either of them touching any of the matters in question, and believes, and upon belief so says, that he never received any; nor has he copies of any letters sent by himself to them or any of them; nor did he ever receive from them or any of them any accounts; nor did he ever execute any writings to which they or any of them were party; and, although he is advised that he is under no obligation to respond to the demand of letters and other documents in said bill made, yet inasmuch as it is charged that he had at the time of the transactions in question an official relation to the complainant, he has thought proper to answer the demands of the bill in that particular.

And, having fully answered the said bill, and denying all fraud and fraudulent combination in the premises, this respondent
83 prays to be hence dismissed with his costs in this behalf sustained.

I. NEVITT STEELE,
A. W. MACHEN,
Solicitors for Respondent.

STATE OF MARYLAND, } *ss:*
Baltimore City, }

I hereby certify that on this 17th day of May, A. D. 1879, before the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city aforesaid, personally appeared John Ellicott and made oath in due form of law that the matters and things stated

and contained in the aforegoing answer are true to the best of his knowledge and belief.

J. HOWARD, *J. P.*

And afterwards, to wit, on the seventeenth day of May, A. D. 1879, the following answer was filed in said cause, to wit:

The Answer of Samuel M. Shoemaker to the Bill of Complaint of the Union Railroad Company against Him and Other Defendants in the Court Exhibited.

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
84 JAMES J. DULL *et al.*

This defendant, not waiving but expressly reserving unto himself all right and benefit of every exception and objection that may be taken to the said bill for the errors, defects, and uncertainties thereof, for answer thereto, or to so much thereof as he is advised is material or necessary to be answered unto, answering, says that in the spring of 1871 the said William W. Wiley and James J. Dull, as this respondent was informed, were among the bidders for the work of the construction of the said railroad and tunnel of the complainant. This respondent at that time was well acquainted with the said Wiley, of whom he entertained a high opinion, but knew said Dull by reputation only. At the time of the offering of proposals for the construction of the said works of the complainant this respondent had no pecuniary interest whatever in any of the bids or proposals, whether of said Wiley and Dull, or either of them, or of said R. Snowden Andrews, nor any expectation of an interest in any contract which might result from said bids or any of them. This respondent knew nothing of the particulars of the bids, and, had he been advised of them, did not possess either experience or information qualifying him to judge of the probabilities of a profit therefrom. Some time after the said proposals had been put in and a contract for the construction of the said tunnel of the complainant made between the said Dull, Wiley and Andrews and the complaint the said
85 Wiley proposed to this respondent that he should have a one-third interest in the profits to be made under the said contract, this respondent being expected to contribute some money in the nature of capital. This respondent's confidence in said Wiley was such that he was very willing to lend or advance him a much larger amount than any he called on him for, and trust to said Wiley for his reimbursement in such manner as said Wiley might prefer; he therefore immediately acceded to said Wiley's proposition aforesaid. No written agreement between said Wiley and said Dull, Wiley and Andrews and this respondent was executed, so far as this respondent has any recollection, and he believes that none was executed. The oral understanding between said Wiley and himself was to the effect aforesaid—that is to say, that if profits should be

realized by the contractors, one-third thereof would be given to this respondent. There was no interview or communication of any kind in the said Wiley's lifetime between this respondent and either of the other contractors in respect to said matter.

Further answering, this respondent says that long before the time of the transactions before mentioned he was on terms of intimacy and friendship with the said John Ellicott. At an early period in this respondent's life, when such kindness was of most value, older members of said Ellicott's family had manifested interest in his welfare, and put opportunities of advancement in his way, and with said Ellicott himself this respondent's relations were always very
86 friendly. During the late civil war, while there was a wide divergence in political sentiment between the said Ellicott, who engaged in the military service of the Southern Confederacy, and this respondent, there was no interruption of personal good will, and when at the end of the war said Ellicott returned to Baltimore with his family, laboring under the difficulties which embarrassed most professional men whose former pursuits had been so long suspended, this respondent was glad to render him all the kindness in his power. For one or two summers the said Ellicott and his family occupied this respondent's dwelling-house in Baltimore during the absence in the country of this respondent's family; and this respondent, having occasion for the services of an architect, in which branch, as in other branches of his profession, the said Ellicott deservedly enjoyed a high reputation, employed him in that capacity. The family of the said Ellicott were also very intimate with the family of this respondent. Owing to all these circumstances the relations between this respondent and him at and about the commencement of the railroad construction aforesaid were more than usually close and friendly, and when the said Wiley, unexpectedly to this respondent, proposed to allow him an interest of one-third in the profits from the said contract this respondent, without attempting to estimate the probable amount of such share of profits, and, in fact, wholly uncertain whether there would be any profits or not, mentioned the fact of said Wiley's promise aforesaid to said Ellicott, and at the same time told him that if anything came of it he would let him, Ellicott, have one-half of what this
87 respondent should so receive. There was no contract or agreement of any kind between said Ellicott and this respondent on the said subject. Whatever benefit there might be in the offer or promise to share what might never exist, it was made by this respondent, and, as this respondent is well assured, was accepted by the said Ellicott, merely as an act of kindness on this respondent's part, without one thought of any relations existing between the said Ellicott and the Union Railroad Company. Had this respondent been base enough to endeavor to bring about a breach of trust on the part of one in the service of the complainant, as imputed in the bill of complaint, it would have been impossible for him to have thought of presenting unworthy inducements of this sort to a gentleman of the unblemished reputation of Mr. Ellicott, an intimate friend of this respondent himself, and one for whom, on

account of his character and personal qualities, he entertained and had manifested a high and sincere regard.

And this respondent utterly and indignantly denies all charges that there was any fraudulent compact or arrangement between the said Ellicott and the said contractors, with the participation or knowledge of this respondent, with respect to the making of the said construction contracts, or either of them, the performance of them or anything connected with them, or succeeding as a consequence therefrom. This respondent denies expressly all fraud on his own part in any of the matters alleged in the said bill, and to the best of his knowledge, information, and belief, neither the said con-
88 tractors, Dull, Wiley and Andrews, nor any of them, nor said Ellicott, were guilty of fraud of any kind in the premises.

Further answering, this respondent says that he understood and now believes that the said Ellicott, some time before the letting of the said work, was in some manner employed by Charles P. Manning, the chief engineer of the said Union Railroad Company, to assist him in some engineering duties connected therewith, but as this respondent had reason to believe, such employment was temporary and precarious, and also was not of a character to affect in any manner the performance by the contractors of their contract, or their compensation under it, and certainly this respondent's offer to share with said Ellicott as aforesaid was made without reference to his relations to the said Manning or the said railroad company, and from no expectation of any advantage to this respondent or the said contractors therefrom.

Further answering, this respondent says the said Ellicott, within a few months after the commencement of the work under the said contract, ceased to be in said Manning's employ, and thenceforward had nothing to do with the complainant or its works, and this respondent is credibly informed and believes, and therefore states, that while the said Ellicott was connected with the said Union railroad the nature of the services performed by him was such as to exclude the possibility of his giving any undue advantage to the said contractors or prejudicing the said company in any manner in its relations with them; that the said Ellicott in fact performed all his
89 duties with fidelity to the complainant and due regard to its interests, was guilty of no fraud, rendered no aid or assistance to the said contractors, nor promoted their advantage in any respect at the expense or to the prejudice of the said Union Railroad Company, nor is it even alleged in said bill that any such fraudulent or improper acts were in fact done by him.

Further answering, this respondent says that he informed said Wiley of the fact of his having promised to divide his own share of profits with said Ellicott, and for convenience said Wiley was authorized to make payments directly to said Ellicott accordingly, and this respondent believes that such payments were made, but has no certain knowledge in regard to them. On account of such profits this respondent received from the said Wiley in his lifetime twelve

thousand five hundred dollars, and since his death has received one thousand and fifty dollars and fifty-three cents from said Dull.

This respondent had no knowledge of the details or particulars of the said original construction contract nor of the said supplemental contract, nor was he consulted about the making of either. This respondent never asked or received from the said contractors, while the said works were in progress, nor from the said Wiley, any accounts of the receipts and disbursements of the contractors or detail statements of any kind in regard to their proceedings under the contract or contracts aforesaid, and his only participation in their business was to take from said Wiley, from time to time, such
90 sums of money as said Wiley represented to be due to him, deducting or allowing for the half part he had authorized to be paid to said Ellicott as aforesaid.

And this respondent, further answering, says that before this suit he never saw the said construction contracts or either of them, nor said arbitration contract, and never deemed himself a partner with the said contractors, or as having any relation with the complainant, his relations being only with the contractors, and resting upon their promise to pay him a portion of the profits of their performance of their contract if any should be realized.

Further answering, this respondent says that after the work under the said contracts were finished he was aware, in a general way, that there was an unsettled account between the contractors and the said railroad company, and some controversy between the parties, founded principally upon certain differences between said Wiley and Mr. Manning, the chief engineer aforesaid, but he had no knowledge at that time of the particulars of the claim of the contractors further than that he understood that a question existed as to whether the contractors should be allowed for the cost of rebuilding a portion of the arch of said tunnel which had fallen down while it was in course of construction, which arch was constructed after said Ellicott had left the service of the said Manning and railroad company. This respondent was told of the reference to arbitration of the questions in dispute, but took no part therein, and was not present at
91 any meeting of the arbitrators.

Before the said reference was accomplished the said Wiley had died, and the said Andrews having assigned his interest to the said Dull and Wiley, the entire conduct and management of the said claim, the arbitration proceedings, and all matters connected therewith devolved upon the said Dull, with whose action this respondent never interfered in any manner, nor imagined that he had any right to interfere; that all the information this respondent has received concerning the said arbitration leads him to believe, and he does fully believe, and therefore, answering, says, that the proceedings before the arbitrators, on the part or behalf of the said Dull, the plaintiff in the case, were fair and regular, and that the award rendered and judgment thereon entered were just and right. As to the testimony of the said Ellicott before the said arbitrators this respondent has no direct knowledge, but he is credibly informed and verily believes that it was truthful and candid; that there was

no concealment or improper withholding of any interest he might have in the result, no question as to such interest having been put to him, and even if the question of the propriety and justice of said award could now be opened the fact that the award was unanimously concurred in by three engineers of high character, one of whom was selected by the complainant, is of itself sufficient to refute the imputations cast upon its correctness, and that in point of fact the subject-matter upon which the said Ellicott was called to testify by the said plaintiff's counsel, and did testify, was a minor
92 matter, merely being only in regard to one division, and that a comparatively small one, of the plaintiff's claim, and one which the arbitrators did not recognize nor allow in their award, so that in fact, having regard to the award actually rendered and to the grounds of it his testimony proved to be and was wholly immaterial, and, had it been out of the case, the award could not have been in the slightest degree altered or affected. And this respondent charges that the allegation made or implied in the said bill of complaint, that the award of damages to the said Dull, made by the said arbitrators, proceeded or was substantially founded on the testimony of the said Ellicott is wholly untrue, and from credible information and belief this respondent denies that any part of the claim of the said Dull, as allowed by the said arbitrators, was based mainly or at all upon said Ellicott's testimony.

This respondent, further answering, says that he is informed and believes, and from information and belief states, that the said contracts of May and July, 1871, between the said Dull, Wiley and Andrews and the complainant were faithfully and fully performed by the said Dull, Wiley and Andrews or Dull and Wiley, and the benefits thereof accepted and enjoyed by the complainant; that all the measurements and estimates on which the compensation of the said Dull and Wiley thereunder was based were made either by Mr. Kenly or Mr. Manning, the resident and chief engineers, respectively, of the complainant, without any aid or participation of the said Ellicott; that all the work done by the said contractors was supervised and directed by said Kenly
93 and Manning, and not at all by the said Ellicott; that all the money paid or adjudged to be paid to the said Dull, Wiley and Andrews, or to said Dull, as surviving partner, was fairly and fully earned under the specification, terms, and provisions of the said contracts, and that all the balance of said judgment debt represented by the said unpaid promissory notes is justly and honestly due from the complainant, and that the resistance to the payment thereof now made by the complainant is an effort on its part to evade the obligation of a just debt, or inequitably to hinder and delay its collection or enforcement. This respondent has not the possession or control in any manner of the said unpaid promissory notes, nor has he ever had possession thereof, and has no knowledge in regard to them.

And this defendant, denying all and all manner of fraud, combination, or conspiracy with which he is most falsely and injuriously charged in the said bill, and having fully answered the said bill, or

so much thereof as he is advised is material to be answered unto, prays to be hence dismissed with his costs in this behalf sustained.

I. NEVITT STEELE,
A. W. MACHEN,
Solicitors for Respondent.

STATE OF MARYLAND, *Baltimore City,* } *ss:*

I hereby certify that on this seventeenth day of March, in
94 the year eighteen hundred and seventy-nine, before the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city aforesaid, personally appeared Samuel M. Shoemaker and made oath in due form of law that all the matters and things stated in the aforegoing answer are true to the best of his knowledge and belief.

GEO. McCAFFREY, *J. P.*

And afterwards, to wit, on the thirtieth day of June, A. D. 1879, the following exceptions to answer of Samuel M. Shoemaker was filed in said cause, to wit:

Exceptions to the Answer of the Defendant, Samuel M. Shoemaker.

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

The complainant excepts to the answer of the above-named defendant as evasive and insufficient, and especially—

1. Because he does not answer whether any contract or contracts were executed between him and the defendant, John Ellicott, or between said Ellicott and Dull and Wiley, as by this bill required.

2. Because the said Shoemaker has not filed with his answer "copies of all accounts which have ever been rendered" be-
95 tween the defendants and William M. Wiley, or any of them, and has not stated when they were rendered.

3. Because said Shoemaker has not produced and filed with his answer all letters ever received by him from said Wiley, the defendant Dull, said Ellicott, or the firms of Dull, Wiley and Andrews, or Dull & Wiley, and has not produced and filed copies of all letters ever written by him to any of the said persons or firms.

4. Because said Shoemaker has failed to disclose when the several payments were made *and* said Ellicott and in what amounts.

5. Because said Shoemaker has failed to produce and file with his answer all accounts whatever rendered to him at any time by said Dull and Wiley, Dull, Wiley and Andrews, William M. Wiley, said James J. Dull, or any clerk or agent of any of them.

6. Because the said Shoemaker has not disclosed whether any other person not heretofore named had any interest in the contracts in the bill mentioned, and what interest and what moneys, if any, were paid to such other person.

7. Because said Shoemaker does not disclose where the notes mentioned in the bill were on the day the bill was filed (February 10th, 1879), and where they were on the 8th and 9th days of said month, and whether they were then in the same condition in which they were received from the complainant.

WILLIAM A. FISHER,
Solicitor for Complainant.

96 And thereupon, to wit, on the said thirtieth day of June, A. D. 1879, the following exceptions to answer of John Ellicott was filed in said cause, to wit:

Exceptions to the Answer of John Ellicott.

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

The complainant excepts to the answer of the defendant John Ellicott because the same is evasive and insufficient, and especially—

1. Because it does not disclose when and in what sums the money in the answer mentioned was paid to said Ellicott.

2. Because it does not disclose when the agreement between said defendants Ellicott and Shoemaker for the sharing of profits was made.

3. Because the said defendant Ellicott does not state whether he has written a letter or letters to said defendant Dull since the obtaining of the judgment in the bill mentioned making demands or requests for more money than the sums paid to said Ellicott, as stated in his answer.

WILLIAM A. FISHER,
Solicitor for Complainant.

97 And afterwards, to wit, on the fourth day of August, A. D. 1879, the following order was filed in the said cause, to wit:

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

Mr. Brewer:

Enter our appearance for defendants, James J. Dull and Jacob C. Bamberger.

I. NEVITT STEELE.
A. W. MACHEN.

And thereupon, to wit, on the said fourth day of August, A. D. 1879, the following certificate of publication of order of publication, together with a printed copy thereof annexed thereto, was filed in said cause, to wit:

OFFICE OF THE BALTIMORE DAILY NEWS,
BALTIMORE, *May 1st*, 1879.

We hereby certify that the annexed advertisement of circuit court order, The Union Railroad Company of Baltimore *vs.* James J. Dull, Jacob C. Bamberger, *et al.*, was published in the Baltimore Daily News, a daily newspaper, printed and published in the city of Baltimore, once a week for four successive weeks, before April 30th, 1879.

First insertion, March 31st, 1879.

HERMANGE & BREWER,
Per E. T. JONES.

98 *Advertisement.*

"In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL, JACOB C. BAMBERGER, *et al.*

The object of this bill is to procure a decree setting aside as void by reason of the fraud of the defendant-, James J. Dull and others, certain contracts entered into during the months of May and July, 1871, between the complainant and the defendant-, Dull and others, for the consideration of the railroad of the complainant, and also an arbitration contract between the complainant and said Dull and the late William M. Wiley, Jr., an arbitration, and the award and the judgment of the Baltimore city court based upon the said award, and to require the defendants, Dull and Samuel M. Shoemaker and John Ellicott, to restore to the complainant the moneys paid by it on said judgment, and for the cancellation of the following promissory notes, which were issued by complainant in settlement of said judgment and are yet unpaid—that is to say, a note of $14,000.00, due February 10th, 1879, another of $18,562.15, due February 10th, 1880, and three interest notes; one for $993.14, due February 10th, 1879; one for $556.86, due August 10th, 1879, and one for $566.14, due February 10th, 1880, all drawn by the complainant, and also for an injunction against the defendants Dull, Shoemaker, and Ellicott to enjoin them from destroying or making away with the accounts and letters which have passed between them.

99 The bill states that at the time the said construction contracts were entered into the said John Ellicott was the chief assistant under Mr. Manning, the engineer of the complainant, and, by reason of Mr. Manning's absence on other work, that the said Ellicott principally superintended the work connected with the letting of the construction, and that at said arbitration he was examined as a witness for said Dull, and the award was largely based upon his testimony, and that, by reason of the examinaiion of said Dull recently as a witness in case in the circuit court of the United States for the eastern district of Pennsylvania, it became known to the complainant, by the admission of said Dull, that the said John Ellicott, and, as complainant believes, said Shoemaker, were secret partners or interested with the contractors, Dull and Wiley, in the said contracts for

construction, and that very large sums of money were paid to said Ellicott by his said co-contractor.

The bill further alleges that all the said contracts, with the award and judgment, were fraudulently and collusively obtained and are void, and that the said Bamberger claims to be the holder of said notes due in February, 1879, but in reality holds them for said Dull.

It is thereupon ordered by the court, this 31st day of March, 1879, that the said complainant, by causing a copy of this order to be inserted in some daily newspaper published in the city of Baltimore once in each of four successive weeks before the 30th day of April, 1879, give notice to the said absent defendants, James J. Dull and Jacob C. Bamberger, of the substance and object of this bill,
100 and warn them to be and appear in this court, in person or by attorney, on or before the 4th day of August, 1879, to answer the premises and show cause, if any they have, why a decree ought not to pass as prayed.

M'h 31, m. 4t.

JAMES R. BREWER, *Clerk.*

True copy.
Test:

JAMES R. BREWER, *Clerk.*"

And thereupon, to wit, on the said fourth day of August, A. D. 1879, the following petition for removal was filed in said cause, to wit:

Petition for Removal to the Circuit Court of the United States for the District of Maryland.

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL *et al.*

To the honorable the circuit court of Baltimore city:

Your petitioners, James J. Dull and Jacob C. Bamberger, two of the defendants aforesaid, respectfully show that the amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum of or value of five hundred dollars; that the controversy in said suit is between citizens of different States.

That your petitioners, the said James J. Dull and Jacob C. Bamberger, were, at the time of the commencement of this suit, and still are, citizens of the State of Pennsylvania, and that The Union
101 Railroad Company of Baltimore, the complainant, are a corporation incorporated by the State of Maryland, by the laws thereof, and that the said Samuel M. Shoemaker, John Ellicott, The Canton Company of Baltimore, and The National Mechanics' Bank of Baltimore, defendants in the said suit, are citizens of the State of Maryland; that in the said suit there is a controversy which is wholly between citizens of different States, and which can be fully determined as between—that is to say, a controversy between the

Union Railroad Company of Baltimore aforesaid and your petitioners.

That your petitioner, James J. Dull, is the sole plaintiff in the said action and judgment in the Baltimore city court mentioned in the bill of complaint, and the sole owner of the said judgment and of all the promissory notes mentioned in the said bill and the collection whereof it is the object of the said suit to enjoin and prevent, and he is the sole survivor of the firm of Dull and Wiley, contractors with the Union Railroad Company in the construction contracts referred to in said bill, and that your petitioner, Jacob C. Bamberger, received from said Dull, to be forwarded to Baltimore for collection, and did accordingly transmit to the National Mechanics' Bank of Baltimore for collection, two of said notes.

And your petitioners further show that the said suit, so far as it relates to your petitioners, is brought for the purpose of restraining and enjoining your petitioner Dull, and is a suit in which there can be a final determination of the controversy, so far as concerns him and your petitioner Bamberger, without the presence of the
102 other defendants as parties in the cause.

And your petitioners further show that by the order of publication of this honorable court, passed in said suit on the thirty-first day of March, A. D. 1879, your petitioners are required to appear in this court on or before the fourth day of August, 1879, to answer the premises, and show cause why a decree ought not to pass as prayed by the said bill of complaint of the complainants, and that the term at which said suit could be first tried has not yet arrived.

And your petitioners offer herewith a bond, with good and sufficient surety, for their entering in the circuit court of the United States in and for the district of Maryland, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that such suit was wrongfully or improperly removed thereto.

And your petitioners pray this honorable court no further herein, except to make the order of removal as prayed, and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States in and for the district of Maryland.

And as, &c., they will ever pray.

I. NEVITT STEELE,
A. W. MACHEN,
Solicitors for Petitioners.

103 Which said petition being read and considered the court here passed and filed in said cause the following order, to wit:

In the Circuit Court of Baltimore City.

Ordered by the court, this 4th day of August, 1879, that the record of the proceedings in the above-entitled cause be removed into the circuit court of the United States for the District of Maryland for trial as prayed.

HENRY F. GAREY.

And thereupon, to wit, on the said fourth day of August, A. D. 1879, the following approved removal bond was filed in said cause, to wit:

Know all men by these presents that we, James J. Dull and Jacob C. Bamberger, as principals, and Samuel M. Shoemaker, as surety, are held and firmly bound unto The Union Railroad Company of Baltimore in the penal sum of two thousand dollars; to the payment whereof, well and truly to be made unto the Union Railroad Company of Baltimore aforesaid and its assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said James J. Dull and Jacob C. Bamberger having petitioned the circuit court of Baltimore city, of the State of Maryland, for the removal of a certain cause therein pending, wherein The Union Railroad Company of Baltimore is plaintiff and complainant and the said James J. Dull and
104 Jacob C. Bamberger and Samuel M. Shoemaker, John Ellicott, The Canton Company of Baltimore, and The National Mechanics' Bank of Baltimore are defendants, to the circuit court of the United States in and for the District of Maryland:

Now, if the said James J. Dull and Jacob C. Bamberger, petitioners as aforesaid, shall enter in the said circuit court of the United States on the first day of the next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to be in full force and virtue.

Witness our hands and seals this 2nd day of August, A. D. 1879.

J. J. DULL. [SEAL.]
J. C. BAMBERGER. [SEAL.]
SAMUEL M. SHOEMAKER. [SEAL.]

As to signature of S. M. Shoemaker:
DAVID KEENER.

Which said bond is thus endorsed, to wit:

"Bond approved. James R. Brewer, clerk."

And the same is transmitted accordingly.

Test: JAMES R. BREWER, *Clerk.*

105 STATE OF MARYLAND, *Baltimore City,* } *sct:*

I, James R. Brewer, clerk of the circuit court of Baltimore city, do hereby certify that the aforegoing is a full, true, and entire transcript, taken from the record and proceedings of the said court in the therein-entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of the circuit court of Baltimore city aforesaid on the twenty-ninth

Union Railroad Company of Baltimore aforesaid and your petitioners.

That your petitioner, James J. Dull, is the sole plaintiff in the said action and judgment in the Baltimore city court mentioned in the bill of complaint, and the sole owner of the said judgment and of all the promissory notes mentioned in the said bill and the collection whereof it is the object of the said suit to enjoin and prevent, and he is the sole survivor of the firm of Dull and Wiley, contractors with the Union Railroad Company in the construction contracts referred to in said bill, and that your petitioner, Jacob C. Bamberger, received from said Dull, to be forwarded to Baltimore for collection, and did accordingly transmit to the National Mechanics' Bank of Baltimore for collection, two of said notes.

And your petitioners further show that the said suit, so far as it relates to your petitioners, is brought for the purpose of restraining and enjoining your petitioner Dull, and is a suit in which there can be a final determination of the controversy, so far as concerns him and your petitioner Bamberger, without the presence of the

102 other defendants as parties in the cause.

And your petitioners further show that by the order of publication of this honorable court, passed in said suit on the thirty-first day of March, A. D. 1879, your petitioners are required to appear in this court on or before the fourth day of August, 1879, to answer the premises, and show cause why a decree ought not to pass as prayed by the said bill of complaint of the complainants. and that the term at which said suit could be first tried has not yet arrived.

And your petitioners offer herewith a bond, with good and sufficient surety, for their entering in the circuit court of the United States in and for the district of Maryland, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that such suit was wrongfully or improperly removed thereto.

And your petitioners pray this honorable court no further herein, except to make the order of removal as prayed, and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States in and for the district of Maryland.

And as, &c., they will ever pray.

I. NEVITT STEELE,
A. W. MACHEN,
Solicitors for Petitioners.

103 Which said petition being read and considered the court here passed and filed in said cause the following order, to wit:

In the Circuit Court of Baltimore City.

Ordered by the court, this 4th day of August, 1879, that the record of the proceedings in the above-entitled cause be removed into the circuit court of the United States for the District of Maryland for trial as prayed.

HENRY F. GAREY.

And thereupon, to wit, on the said fourth day of August, A. D. 1879, the following approved removal bond was filed in said cause, to wit:

Know all men by these presents that we, James J. Dull and Jacob C. Bamberger, as principals, and Samuel M. Shoemaker, as surety, are held and firmly bound unto The Union Railroad Company of Baltimore in the penal sum of two thousand dollars; to the payment whereof, well and truly to be made unto the Union Railroad Company of Baltimore aforesaid and its assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said James J. Dull and Jacob C. Bamberger having petitioned the circuit court of Baltimore city, of the State of Maryland, for the removal of a certain cause therein pending, wherein The Union Railroad Company of Baltimore is plaintiff and complainant and the said James J. Dull and
104 Jacob C. Bamberger and Samuel M. Shoemaker, John Ellicott, The Canton Company of Baltimore, and The National Mechanics' Bank of Baltimore are defendants, to the circuit court of the United States in and for the District of Maryland:

Now, if the said James J. Dull and Jacob C. Bamberger, petitioners as aforesaid, shall enter in the said circuit court of the United States on the first day of the next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to be in full force and virtue.

Witness our hands and seals this 2nd day of August, A. D. 1879.

J. J. DULL. [SEAL.]
J. C. BAMBERGER. [SEAL.]
SAMUEL M. SHOEMAKER. [SEAL.]

As to signature of S. M. Shoemaker:
DAVID KEENER.

Which said bond is thus endorsed, to wit:

"Bond approved. James R. Brewer, clerk."

And the same is transmitted accordingly.

Test: JAMES R. BREWER, *Clerk.*

105 STATE OF MARYLAND, *Baltimore City,* } *sct:*

I, James R. Brewer, clerk of the circuit court of Baltimore city, do hereby certify that the aforegoing is a full, true, and entire transcript, taken from the record and proceedings of the said court in the therein-entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of the circuit court of Baltimore city aforesaid on the twenty-ninth

day of August, in the year of our Lord eighteen hundred and seventy-nine.

[Seal of Court.]

JAMES R. BREWER,
Clerk of the Circuit Court of Baltimore City.

106 *Appearance in U. S. Circuit Court.*

And thereupon, afterwards, to wit, on the first Monday of November, in the year 1879, come into the circuit court here the parties in the said record mentioned, by their said solicitors.

Answer of James J. Dull. Filed 4th Nov'r, 1879.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE UNION RAILROAD COMPANY OF BALTIMORE

vs.

JAMES J. DULL *et al.*

Removed from the circuit court of Baltimore city.

The answer of James J. Dull to the bill of the Union Railroad Company of Baltimore against him and other defendants in this court exhibited.

This defendant, not waiving, but expressly reserving unto himself all right and benefit of every exception and objection that may be taken to the said bill for the many errors, defects, and insufficiences thereof, for answer thereto, or to so much thereof as he is advised is material or necessary to be answered unto, answering, says that the complainant, in the winter or spring of the year 1871, did advertise for proposals for the work of the construc-
107 tion of its said railway, and that this respondent and William M. Wiley, both of whom were citizens of the State of Pennsylvania, did in concert put in proposals; that the said R. Snowden Andrews, having at the time no connection or association with said Wiley or this respondent, was also a bidder for the said work, and some time after the proposals had all been put in, according to the terms of the said advertisement, the said Wiley acting on behalf, both of himself and of this respondent (who was not at the time in Baltimore), had an understanding with the said Andrews, by which, in case of the acceptance of the bid of either, the other should be admitted to participate in the contract; and the said understanding being communicated to the complainant, the contract, founded upon the proposal of this respondent or said Wiley (being in the judgment of the president and directors of the complainant the lowest of the proposals offered), was made by the complainant with the three—that is to say, this respondent, said Wiley, and said Andrews, jointly which is the same contract, dated May 1st, 1871, mentioned in the bill and contained in the record, therein referred to as an exhibit; and some time after the work under said contract

had been commenced and whilst it was in progress the supplemental agreement or contract, dated the 6th day of July, 1871, also referred to in the bill and mentioned in said record was made between the complainant and the three contractors aforesaid; and afterwards the said Andrews assigned his interest and share in said contracts to this respondent and said Wiley
108 and by consent of the complainant was released from the obligations thereof, and the same thereupon devolved wholly upon this respondent and said Wiley, so that thenceforward this respondent and said Wiley, constituting a firm or partnership, under the name of Dull & Wiley, were the sole contractors for said railroad construction, and, as such, wholly performed the residue of the work in said original and supplemental agreements stipulated for, and having afterwards fully and perfectly completed the same, they became entitled to receive the entire compensation promised and agreed upon.

Further answering, this respondent says that from time to time while the said work was in progress, payments were made by the complainant on account thereof to the said Dull and Wiley, or before the said withdrawal of said Andrews, to said Dull, Wiley and Andrews; although none of said payments were made directly to this respondent, all receipts and disbursement connected with the said work from its commencement to its completion, being made to and by the said Wiley, who personally and immediately superintended and directed all said work; that disputes did arise between the said Wiley and this respondent, on the one part (represented by the said Wiley), and the complainant, on the other, with regard to some of said work, and the amount of the compensation which ought to be paid under the contracts to this respondent and Wiley aforesaid, but it is not true, as stated or charged in said bill, that
109 the said controversies were principally or very largely based upon the said change of the model or plan of the tunnel arch, but the principal matters claimed on the part of the contractors aforesaid, and disputed on the part of the complainant, were as follows, that is to say:

1st. That certain deductions or abatements arbitrarily sought to be made by Charles P. Manning, the complainant's chief engineer, from the original measurements and accounts, made by its resident engineer, John R. Kenly, and which had been previously approved by said Manning, were unfair and improper, and that the balance of $28,630.98, appearing to be due according to the original accounts, should be paid without diminution.

2nd. That interest on said balance, and on all sums due from the complainant, should be calculated from July 16th, 1873, the time of the completion of the work, and paid to the contractors.

3rd. That the contractors were entitled to a large additional allowance for haul of material, lifted by means of expensive hoisting apparatus, employed to the great benefit of the railroad company, and saving of much cartage, which they would otherwise have had to pay for.

4th. That the contractors should be paid the cost of reconstruct-

ing a portion of the tunnel arch, which had falled down without fault on their part, and as they claimed, by reason of engineering errors.

110 5th. That they were entitled to sundry miscellaneous allowances—namely, for the value of certain building-stone—remaining over after the completion of the work, and appropriated by the complainant, and for earth excavated and hauled to supply shrinkage in original filling over arch, &c.

Further answering, this respondent says it is true that the arbitration agreement referred to in the bill and contained in said record was made between himself, as surviving partner of the said Wiley (who in the meantime had died, as stated in the bill) and the complainant, whereby all the said matters in controversy were referred to the arbitrament of Henry Tyson, nominated by this respondent, and Robert K. Martin, nominated by the complainant, both of whom were civil engineers, and that the said two arbitrators thereupon chose H. D. Whitcomb, an eminent engineer, living in Virginia and a citizen of said last-mentioned State, as a third arbitrator in the premises, which said selection was approved and agreed to by the complainant and this respondent; and the said three arbitrators thereupon proceeded patiently and carefully to hear, consider, and determine all the matters so referred to them; that under the said supplemental construction contract of July 6th, 1871, the contractors, Dull, Wiley, and Andrews, had made themselves responsible for certain damages to buildings and contents of buildings along the line of that part of the said tunnel which should be made by open cutting as therein provided, as by reference to said agreement

111 of July 6th, 1871, will more particularly appear, instead of by means of boring or drifting, as originally contemplated, and the complainant contended that, according to the letter of the said supplemental agreement, the covenant of the contractors to indemnify the complainant against damages of such description extended also to that part of the tunnel constructed by boring or drifting, and the complainant insisted, as a condition of its entering into such arbitration of engineers, that the question of the legal construction of said writing should be referred to a lawyer, whose decision thereof should be accepted as final, as well by said arbitrators as by this respondent and the complainant; and the said question of verbal construction was accordingly referred, as a question of law, to Archibald Stirling, Junior, Esquire, who decided adversely to the interests of this respondent and to the manifest equities of the case; but this respondent in good faith immediately accepted and acquiesced in said decision, and consented that the complainant should be indemnified and compensated for all said damages upon said covenant by the allowance of the amount thereof by said arbitrators as an offset against the moneys to be found by them to be due from the complainant to this respondent, so that their award should be only for the balance remaining in favor of this respondent upon the whole account after deducting such damages, and this respondent hoped that the complainant on its part would then allow said arbitration to proceed without interposing any further difficulties; but after

112 the said three first above-named arbitrators had met to hear and determine the matters so submitted to them as aforesaid, the complainant set up the pretence that, in addition to its claim upon said covenant of indemnity, it was entitled to claim damages of this respondent, *ultra* said covenant and beyond the scope of the said original agreement of reference, for alleged failure of the contractors to perform all their duties under the contracts, and threatened that unless this respondent would accede to its said new demand and docket and refer a cross-action for the causes last mentioned the complainant would revoke the submission to arbitration; and this respondent, notwithstanding the injustice of such demand, so made at that late day, acceded to the same, and such cross-action was accordingly docketed and referred, but afterwards proved to be utterly unfounded in fact, as the arbitrators found.

Further answering, this respondent says that the above-named arbitrators, Messrs. Tyson, Martin, and Whitcomb, ascertained and determined to be due to him upon the said construction contracts, and matters connected therewith, the sum of $73,240.70; and, after crediting and deducting the sum of $19,081.50, the amount of the damages to buildings and contents, as ascertained by agreement of parties, under and according to the said covenant, as so interpreted as aforesaid, they rendered their award in favor of this respondent for the balance, amounting to the sum of $54,159.20, upon which award judgment was duly entered up; and in the said award

113 nothing whatever was allowed or awarded to this respondent upon that part of his claim which was founded on the said change of plan or model; and the allegation upon which the whole of the supposed equity of the bill is based, that said alleged change of model or plan entered largely into the claim of this respondent before the arbitrators, and that upon it, as supported by the testimony of said Ellicott, the award was in considerable measure founded is grossly untrue, as the complainant had ample means of knowing. The statement of items presented by this respondent's counsel at the hearing before the arbitrators, and a copy of which was furnished to the complainant's counsel, disclosed the fact that all the items of claim founded on the said change of plan amounted to something less than one-ninth of the whole claim, and, relatively small and unimportant as was said portion of this respondent's claim, none of it was in fact allowed by the arbitrators, whose award was given altogether for other matters, in regard to which said Ellicott gave no testimony.

And, further answering, this respondent herewith files, as part of this his answer, the original statement of items of his claim before said arbitrators (marked Exhibit J. J. D.), which was presented by his counsel to the arbitrators at the hearing, and which now bears the memoranda of the arbitrators, in the handwriting of the said Henry Tyson, one of them, as aforesaid, showing in detail what items were allowed and what rejected and all the particulars which

114 entered into the award; and this respondent is informed and believes, and therefore states, that the said memoranda or

notes were the original minutes, made by authority of all the arbitrators, during their deliberations, and expressive of the conclusions and findings they jointly arrived at, and which entered into their award.

Further answering, this respondent denies that the said award of said arbitrators was unjust or wrong in any respect or particular, but avers that the whole sum of money thereby awarded to this respondent was justly due to him from the complainant in the premises. The said arbitrators were all skilful and experienced civil engineers, men of the highest integrity and honor, and wholly incapable of rendering an unfair judgment in favor of either party, and the award was their unanimous act and was signed by them all, as appears by the record filed as aforesaid by the complainant.

Further answering, this respondent says he believes it to be true that at the time of the preparation of the specifications for the said proposals or biddings the said Charles P. Manning was the chief engineer of the complainant, and that the said John Ellicott was in some manner employed as his assistant. At the time of the said proposals and the letting of the work this respondent knew said Manning, but had had no previous acquaintance with said Ellicott. As to the extent of said Ellicott's participation in the work preliminary to the advertisement for proposals, this respondent has no
115 knowledge, but he is informed and believes, and therefore states, that said Ellicott had no part in the letting of the work or in the making of said contracts. At the time of the bids or proposals of this respondent and his said associate, Wiley, said Ellicott was not interested with them in any manner whatsoever, nor had this respondent, nor, to the best of his knowledge and belief, had the said Wiley at that time any relations of any kind with him. The interviews of this respondent on the subject-matter of the proposals were principally or altogether with said Manning, who gave him all the information he received in regard to the contemplated work beyond what was afforded by the printed specifications and the drawings or plans, which were open to the inspection of all.

Further answering, this respondent says that the said Ellicott, about six months after the commencement of said work and long before its completion, ceased to be in the complainant's service, or connected in any manner with its works or operations, and whilst he was connected with the complainant he, the said Ellicott, had nothing to do with the works upon which the contractors were engaged, nor with anything affecting their pay or compensation. The work was done under the exclusive direction and supervision of Charles P. Manning, the aforesaid chief engineer, and John R. Kenly, the resident engineer. All the measurements and estimates were made by the said Kenly, and were approved personally and directly by the said Manning.

116 Further answering, this respondent says it is true that the said Ellicott was called and examined by this respondent's counsel as a witness before said arbitrators, the sole subject upon which he was examined being as to the fact of a change of the plan for the tunnel wall and arch (more especially with respect to the

thickness of the walls and number of courses of bricks in the arch), after the letting of the work, the object being to show that a certain drawing, produced by the Union Railroad Company at the trial, differed from that prepared before the letting and exhibited to the bidders. No statement was made by or on behalf of this respondent, or by said Ellicott, that he was disinterested or otherwise; nor was any question as to his interest asked by the complainant's counsel, although they had full opportunity to do so, and all the testimony of the said Ellicott was perfectly true, although the arbitrators did not, as aforesaid, think proper to allow the items of claim upon which it bore, and had he not been examined at all, the award must have been precisely what it is, and the allegation of the complainant in its said bill, that "upon his (the said Ellicott's) testimony, mainly, if not entirely, the said arbitrators allowed the pretended claim of the said Dull, based upon an allegation of the change of the model for the construction of the said tunnel, and also other of the claims made by the said Dull," is utterly false, the fact being, as above stated, that the said Ellicott testified upon no claim whatever, except what was based upon the change
117 or supposed change of model or plan, and that all the claim based on such change (comparatively unimportant at most) was disallowed by the arbitrators, and that the award was wholly independent of all said matter and testimony.

It is true, as stated in the bill, that this respondent was himself sworn and examined, and did testify before the said arbitrators; he has no recollection of having said that he was the sole surviving contractor, but if he did so testify, it was true, for said Andrews, while the work was in progress, with the consent of the said Union Railroad Company, assigned his part in the contract to this respondent and said Wiley, and said Wiley had subsequently died.

And the fact that the only contractors were this respondent, said Wiley and said Andrews, appeared on the face of the contract itself, and, together with the further facts of the withdrawal of Andrews, and death of Wiley, was also stated and admitted in the very agreement of reference.

Further answering, this respondent says that, after the filing of the said award in the Baltimore city court, judgment was duly entered thereon in favor of this respondent against the complainant; that the complainant afterwards made a payment in cash on account thereof and gave its promissory notes, accompanied by the guaranty of the said Canton Company, as shown by the said transcript of record filed as an exhibit by the complainant, and that, in consideration thereof, this respondent consented to a stay of execution on
118 said judgment, so long as the complainant should pay the said notes according to their tenor, as more particularly shown in and by said record, and that the said promissory notes were drawn payable to blank or order, no name of a payee being inserted, and that all of said notes have been paid excepting those mentioned in said bill.

Further answering, this respondent says that at the time of the putting in of proposals for said work by this respondent and said

Wiley they had not, nor had either of them, any third person associated or interested with them in any manner therein. While themselves partners, they were, in their bids, disconnected with all other persons whatsoever. Upon the putting in of his bid the respondent left Baltimore, and confided to the said Wiley the duty of attending to their joint interests. While absent this respondent's consent was sought by said Wiley to the taking in of R. Snowden Andrews (whom he knew to be also a bidder), as a joint contractor with them in case of the company's acceptance of their bid, and, an impression prevailing that there might be hesitation in awarding the contract wholly to persons not citizens of Maryland, this respondent gave his consent accordingly.

Further answering, this respondent says that after the work was let he knew that said Wiley and himself, jointly, were to be entitled to receive and retain one-half of any profits which should be made from the performance of it, and he became aware that the other half would be so divided that Samuel M. Shoemaker, of Baltimore, would have some part, and the said Andrews the residue, but as
119 to the respective proportions of the said Andrews and Shoemaker he was not at first, so far as he is now able to recollect, informed. It being a very common thing for outside parties furnishing capital or credit to be given an interest in the profits of construction contracts, and it in no manner affecting this respondent's own interest in the one-half understood to belong to Dull and Wiley, how the rest was shared between the other persons concerned, this respondent made no inquiry at the time regarding it. He has since ascertained and therefore states that the arrangement with said Shoemaker was that he should receive one-third of the whole profits, leaving one-sixth for the individual benefit of said Andrews. At the time this respondent was so first informed of some interest in the profits having been given to Mr. Shoemaker the name of the said Ellicott was not mentioned to him in connection with the matter, nor was he told, nor did he understand, that said Ellicott had any interest of any kind in the profits of the contract, and it was not until some time in the summer of 1871, and after the making of the said supplemental contract of July 5th, 1871, that this respondent learned of said Ellicott's having an interest, nor did he then know whether it was given him by said Shoemaker or by said Andrews. This respondent expressly denies, however, that he and said Wiley (in copartnership as aforesaid as Dull and Wiley), or either of them, gave or promised any part or share of profits of the contract or contracts aforesaid or other pecuniary benefit whatsoever,
120 to said John Ellicott, and avers and states that whatever interest said Ellicott acquired therein was derived from some other party, and not at the instance or suggestion nor with the knowledge of this respondent. Since the institution of this suit this respondent, upon inquiry, has been credibly informed, and therefore now states, that the said Shoemaker, some time after it had been agreed between the contractors and himself that he should be entitled to one-third of such profits as might be made, voluntarily promised to give to said Ellicott one-half of his said share, the half

part so promised being equivalent to one-sixth of the whole. During the lifetime of said Wiley this respondent made no payments either to said Shoemaker or said Ellicott; but when, after Wiley's death, the duty devolved upon this respondent, as his surviving partner and the sole remaining and surviving contractor, to close up the business by effecting a settlement with the said Union Railroad Company, and afterwards duly applying or distributing the proceeds, he made distribution of such of the net proceeds of the claim as came into his hands under the said award and judgment in the same manner and proportions as had been recognized by said Wiley—that is to say, giving one-sixth to said Shoemaker, one-sixth to said Ellicott, and the residue to Dull and Wiley, said Andrews' interest in the profits having been transferred to said Dull and Wiley at the time of his assignment as aforesaid of his part in the contract; that the private and subordinate arrangement by which Mr. Shoemaker, who was expected to advance and did advance part of the
121 necessary capital, should be compensated by a proportion of the profits of the contract could prejudice the complainant in any manner it never entered into the mind of this respondent to imagine, and it is manifest that the complainant could never be prejudicially affected thereby, inasmuch as the responsibility of the actual contractors to the campany and their liability *in solido* for the performance of the whole work remained unaltered, nor did such admission of a third party into participation of the resulting parties, if any, change in any manner the relations of the contractors to the work, which they continued personally to have charge of and conduct in the same manner as if no such arrangement had been made. As contractors, remaining personally bound to the company for the performance of the work, they did, in fact, prosecute it to its successful completion, and as to the acquisition by said Ellicott of an interest in said profits under said Shoemaker, it proceeded from the voluntary act of the latter without the knowledge and independently of the volition or control of this respondent, who therefore respectfully submits that he cannot be justly or equitably held responsible therefor; but he is informed and believes, and, answering, states, that there was not, in fact, any fraudulent intent therein, nor did any injury to the complainant follow therefrom.

The assumption, therefore, gratuitously made in the bill, that there was something fraudulent in the existence of any private pecuniary arrangement between the contractors and a third party not
122 affecting the performance of the contract by the actual contractors is utterly without foundation, whether reference is had to what is customary in cases of railroad and other construction contracts or to the facts of the particular case. This respondent expressly denies that any fraud was practised or intended by this respondent, or by any other person in the said arrangement with said Shoemaker, or in any matter connected with or growing out of the same. This respondent expressly denies that any fraudulent use or any advantage whatsoever was intended to be derived, or in fact — derived, by this respondent, said Wiley and said Andrews, or

any of them, from the relations of the said Ellicott to the complainant or to its chief engineer.

Further answering, this respondent says that the preparation of the specifications preceded the biddings for said work and were the same communicated to all the bidders and upon which all the proposals were founded. The rates of compensation were determined by the bids, with which said Ellicott had no connection, either as to the making thereof by this respondent and said Wiley or the acceptance of the same by the officers or directors of the Union Railroad Company, and the work itself done under the contracts was wholly directed and controlled by the said Charles P. Manning, the complainant's chief engineer, and the said John R. Kenly, resident engineer, by whom all measurements and estimates were made; and whatever the relations of the said Ellicott to the complainant may have been (and this respondent is informed and believes that
123 in fact he was not directly in its employ, but was only employed temporarily for certain special purposes by the said chief engineer for his own convenience) the said relations and all the office and work of said Ellicott as engineer in connection with said railroad were disconnected with the contracts aforesaid, and with the doing of the work thereunder, and the compensation paid or to be paid by the said Union Railroad Company for or in respect of the same.

Further answering, this respondent says that while the work under said contracts was being performed the entire management thereof was entrusted by this respondent to the said Wiley, who remained in Baltimore and gave his personal attention to it, this respondent being at the time occupied with other important works elsewhere. All practical details, including all receipts and all disbursements of moneys, were exclusively in said Wiley's hands, this respondent having no participation therein, except from time to time to receive, for his own account, such moneys as said Wiley paid to him on account of his share of profits realized. This respondent's confidence in said Wiley's probity and business qualities was unlimited, and he never required or received from him any detailed accounts, but accepted without question his reports of the net results, as from time to time informally and verbally cummunicated. Of the sums of money paid by said Wiley to said Shoemaker and Ellicott, respectively, this respondent had at the time no knowledge and now knows nothing except from hearsay, but, upon probable information,
124 he says that he understands and believes that to said Shoemaker said Wiley made payments amounting in the aggregate to $12,500, and to said Ellicott payments amounting to about the same sum.

The death of said Wiley, which occurred on or about the — day of November, A. D. 1874, obliged this respondent to give his personal attention to the adjustment of the pending controversy with the said Union Railroad Company, and he accordingly signed the agreement of submission, obtained the judgment on the award rendered by the arbitrators, and received the cash payment made upon said judgment by the complainant, and took from it the promissory

notes mentioned in the bill, and as they from time to time matured received payment of such of them as have been paid and were in his hands at maturity. All of the said unpaid notes, except the two which fell due at or about the time of the granting of the injunction in this case, are in his possession, and the said two notes are held by the said National Mechanics' Bank of Baltimore for the said Bamberger, who holds them for the account of this respondent. In the application and disbursement of the moneys so hitherto collected by this respondent under said award and judgment he has paid to said Samuel M. Shoemaker the sum of $1,050.53, and to said John Ellicott the sum of $1,298.14, by transfer of one of the interest notes of the complainant for that amount, and he accounted with the executors of said Wiley for said Wiley's share of the same.

This respondent admits that at the trial in the circuit court
125 of the United States for the eastern district of Pennsylvania of the said suit of Milo W. Locke against the executors of the said William M. Wiley in the month of October, in the year 1878, this respondent being called as a witness by the said executars, gave testimony concerning matters there in issue, and that, being interrogated under cross-examination touching the interests of third parties in the profits of the said construction contracts made between said Dull, Wiley and Andrews and the Union Railroad Company, he answered truthfully, according to the best of his knowledge and belief, that Samuel M. Shoemaker and the said John Ellicott were interested therein, although this respondent, in point of fact, at that time was imperfectly informed as to the manner in which the said interests originated.

This respondent utterly denies that the said construction contracts, or either of them, or the said award and judgment were obtained by fraud, as charged in the bill. He says that all the work required or provided to be done or performed by the contractors, Dull, Wiley and Andrews, in and by the said contracts of May 1st and July 5th, 1871, were duly done and performed, and all the compensation therein provided for fully earned, and the balance due from the said Union Railroad Company to the contractors aforesaid, and this respondent as surviving contractor as aforesaid, was liquidated, adjusted, determined, and finally and conclusively settled by the said award, and by the judgment of the Baltimore city court aforesaid, and it would be most inequitable if the complainant, after
126 having accepted said work and received and enjoyed the benefit of the performance thereof by the contractors aforesaid, could escape from paying for the same upon the pretexts set up in the said bill; and this respondent respectfully asks the attention of the court to the fact that it is not pretended in said bill that the stipulated work was not fully done, nor that the same has not been accepted by the complainant as in full performance of the obligations of the said contracts; nor that the said submission was not fairly made, nor that there was any want of fidelity on the part of the arbitrators; and this respondent insists and relies upon the said submission and award, the said judgment of a court of law of competent jurisdiction, and the agreement by which, upon the faith of the

promissory notes of the complainant and guaranty of the said Canton Company, this respondent indulged the complainant with a stay of execution of said judgment as aforesaid (which agreement was faithfully kept and regarded by this respondent) as a bar to all the relief prayed by the complainant.

And, having fully answered the said bill, or so much thereof as this respondent is advised is material to answer unto, and denying all fraud, fraudulent combination, and conspiracy whatsoever charged or alleged in said bill, without this, that any other matter or thing material to be answered unto is true, this respondent prays that the injunction heretofore granted in the premises may be dis-
127 solved, and that this defendant may be hence dismissed with his costs in this behalf sustained.

J. J. DULL.

I. NEVITT STEELE,
A. W. MACHEN,
Sol'rs for Respondent.

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I hereby certify that on this 20th day of May, A. D. 1879, before the subscriber, a justice of the peace of the State of Maryland, in and for Baltimore city aforesaid, personally appeared James J. Dull and made oath in due form of law that the matters and things stated and contained in the aforegoing answer are true to the best of his knowledge and belief.

J. HOWARD, *J. P.*

UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

Before me, the subscriber, personally appeared, this twenty-seventh day of October, in the year of our Lord eighteen hundred and seventy-nine, James J. Dull and made oath in due form of law that the facts set forth in the foregoing answer, so far as they purport to be stated of his own knowledge, are true, and so far as they purport to be stated on information and belief he believes — to be true, and at the same time said James J. Dull
128 subscribed his name to said answer.

GEORGE MORRIS BOND,
United States Commissioner for the District of Maryland.

129 *Statement of Items.*

EXHIBIT J. J. D.

DULL *vs.* UNION RAILROAD CO.

MEM.—Words and figures underscored in this exhibit are interlined in and added to the original in a different handwriting.

Balance appearing to be due the contractors upon the estimates and accounts as furnished by company----	28,630 98

Interest on $73,240.70 allowed Dull at 6 per cent. from July 15, 1873, to Dec. 12, 1876		12,356 49
In addition thereto the contractors claim for 2,000 cubic yards of stone purchased by them and used by company for ballast, at $4 per yard	8,000	
76,00	2,000	
15,2,000 cubic yards shrinkage of replaced earth (5/10 per cent. upon 15,2,000 yards) at 35c.	5,235	
		2,642 50
Haul of the said 7,600/15,200 yards at 1,000/3,710 feet (Mr. Hutton's average haul)	7,049	
	1,040	
Cost of reconstructing break in tunnel arch		5,178 07
Damage to contractors by change of plan in substituting 5 rings of brick for 6 in arch of tunnel (not proved)		3,175 27
Damage in reducing thickness of sustaining walls of tunnel from 6 feet to 5-17,900 cubic yards, at 50c. (not proved)		8,450

130 Damage in substituting in part brick for stone in lining of tunnel between base and spring line, as follows:

Amount of brick-work so substituted for stone 4,220 cubic yards.

Cost of brick per yard	$5 50	
" " stone " "	4 00	
Difference in material	$1 50	
Credit by difference in price paid under contract, 9,509.00	50	
Net loss	1 00	
422 x 1 (not proved)		4,220
1,150 cubic yards, fall in drift at $5, contract price for drifting (not proved)		5,750
Haul of this 3,710 feet, Mr. Hutton's average		426
1,150 cubic yards replaced over tunnel in filling the depression of the surface, at 35c.		402
Haul of this 540 feet		62

1,000 feet, lineal, of ditch, excavated in solid rock, costing contractors, in excess of price of common-rock excavation, $2 per foot (not allowed)		2,000
Extra cost of constructing eastern approach walls with ashlar facing (allowance only for portal)		9,316 02
14,000 cubic yards of excavation		320
131 From Borrow Pits, at 30c. (not allowed)		4,200
3,300 cubic yards of excavation not embraced in engineer's cross-sections, as calculated by Mr. Martinet, at 75c. (not allowed)		2,475
Haul of this 3,710 feet, Mr. Hutton's average (not allowed)		1,530 37
3,300 yards replaced, at 35c. (not allowed)		1,155
Additional haul upon which contractors are entitled to be allowed upon material included in the estimates, viz:		
According to the calculation of Mr. Hutton	57,215 40	
Less	7,344 66	
		49,870 74
N. B.—Mr. Yonge's estimate for the whole work is	94,874 43	
Amount allowed in the estimates	49,133 91	
Difference	45,740 52	
Allowance in lieu of all claims for Hall		20,000
		147,175 45
An allowance of 100 feet horizontal for 6 feet vertical would amount upon 123,382 yards, over and above the estimates of company's engineer, to (see Mr. Yonge's calculation)		$15,979 72
(Allowance in $20,000, on last page, include lift.)		
132 Interest from July 15, 1873, to July 18, 1873, on		$25,000
" " " 21, "		25,000
" " Feb'y 24, 1874, "		5,000
" " Mar. 3, 1874, "		10,000
Interest		608 66
		147,784 11

Interest on the whole amount (except $608.61) from July 15, 1873, to this time (allowed in first page).

Allowance to Dull, Wiley and Andrews:	
	28,630 98
	12,356 49
	2,000
	2,642 50
	1,040
	5,178 07
	402
	62
	320
	20,000
	608 66
Total allowance to Dull, W. & A.	$73,240 70
Allowance to Union Railway Co. as per agreement presented to commissioners	19,081 50
Award to Dull, Wiley & A.	$54,159 20

133 (MEMORANDUM.)—The sum of fifty-four thousand one hundred and fifty-nine dollars and twenty cents, $54,159.20, was entered upon the award to plaintiff, and the paper sealed and handed by the entire board of arbitrators in person to counsel for plaintiff on Dec. 13th, 1876.

HENRY TYSON.

Exceptions to Answer of J. J. Dull. Filed 2nd January, 1880.

In the Circuit Court of the United States for the District of Maryland.

THE UNION RAILROAD COMPANY OF BALTIMORE

vs.

JAMES *H.* DULL *et al.*

To the honorable the judges of the circuit court of the United States for the district of Maryland:

The complainant excepts to the answer of the defendant, James J. Dull, to the bill of complaint in this case for the reasons following:

1. Because he fails to state whether any contracts in writing in relation to the work under the construction contract mentioned in the bill was ever made between him and others and the defendant John Ellicott, when and where the same were executed and where the same now are, and has failed to attach copies thereof to his said answer.

134 2. Because he has failed to produce and file copies of all the accounts which — ever been rendered between him or him

and others and any or all the other defendants, and has failed to state when they were rendered.

3. Because said Dull has failed to produce all letters received by him and by the firms of Dull, Wiley and Andrews and Dull and Wiley from said John Ellicott, and copies of all letters written by said Dull, Wiley and Andrews, or Dull and Wiley, or the defendant Dull to the defendant Ellicott, and to the defendant Shoemaker, and to R. Snowden Andrews since the 1st day of March, 1871, and to produce all letters received by him or said firms from said Samuel M. Shoemaker or R. Snowden Andrews since said last-named date.

4. Because said Dull has failed to disclose what amounts were from time to time paid by Dull and Wiley to the defendant Ellicott, when the several payments were made, and to produce the checks by which such payments were made.

5. Because said Dull has failed to disclose when and in what amount from time to time payments were made to said Shoemaker, and has failed to produce the checks paid to said Shoemaker.

CHARLES MARSHALL,
WILLIAM A. FISHER,
Solicitors for Complainant.

135 *Motion to Remand. Filed 22 January,* 1881.

In the Circuit Court of the United States in and for the District of Maryland.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL & Others.

The complainant moves the court here to remand the record of proceedings to the circuit court of Baltimore city and to proceed no further in said cause, because the application for the remand to this court was not made within the time required by the act of Congress in such case made and provided, and because the cause is not embraced within the jurisdiction of this court, and the petition for the removal was not sufficient in form and substance to enable the petitioners to procure the order of removal.

MARSHALL & FISHER,
Solicitors for Complainant.

136 *Opinion of Court on Motion to Remand. Filed 20th June,* 1881.

In the U. S. Circuit Court for the District of Maryland.

THE UNION R. R. CO. OF BALTIMORE
vs.
JAS. J. DULL, of Pa.; SAM'L M. SHOEMAKER, of Md.; JOHN ELLICOTT, of Md.

Motion to remand.

The Union R. R. Co. of Baltimore, a Maryland corporation, filed its bill in equity in the State court, alleging, in substance, that in

1871 it made a contract with Wiley & Dull (citizens of Pa.), partners, of whom the defendant Dull was now the survivor, for the construction of a railway and tunnels; that, upon the completion of the work, controversies arose between the company and said Wiley and Dull with regard to their compensation, said contractors claiming, among other things, that the model of a tunnel made by the company's acting chief assistant engineer, Ellicott, upon which they based their biddings, and the contract had been afterwards altered to their disadvantage.

That said Dull, as surviving partner of Dull and Wiley, had thereupon sued the company in a State court, and, by agreement, the matters in dispute were referred to certain arbitrators, and upon their award judgment for $54,000 had been entered in said cause in favor of Dull against the company.

137 It further alleged that said Ellicott during the time of the preparation of the specifications for biddings and the executing of said contract, in the absence of the company's chief engineer, Manning, had had confided to him the general superintendence of the matters connected therewith, and remained in the employment of the company for about a year, when he left its service.

It further alleged that said claim of the said contractors upon which they obtained said award and judgment was without any foundation.

It further alleged that at the hearing before said arbitrators said Ellicott had been presented as a disinterested witness on behalf of said Dull, and that upon his testimony mainly the arbitrators had allowed the said claim based upon an alleged alteration of the model of the tunnel to which said Ellicott testified.

It further alleged that Dull himself was sworn before said arbitrators, and testified that he was the sole surviving contractor.

It alleged that after said judgment was entered promissory notes extending through several years were given for it to said Dull, which had been paid as they fell due, but that about $33,000 remained unpaid, one of which was deposited in a bank in Baltimore for collection and was about to mature.

It alleged that recently it had learned, through a person who was present at the trial of a case in the circuit court for the E. D.

138 of Pa., between a certain Locke and said Dull and the executors of Wiley, that the said Dull, being examined as a witness, had testified that in said contract with said company the said Wiley and Dull had two secret partners, who still retained their interests in the result thereof, one of them being S. M. Shoemaker, of Baltimore, and the other said Ellicott, and testified that he had paid them large sums on account of their interest in said contract, and had not yet fully paid them.

It alleged that it had since learned that $18,000 had been paid to said Ellicott.

It charged that the amount awarded to said Dull were so awarded by reason of the covinous and fraudulent conduct of Dull and Ellicott, and that the contract and the agreement of arbitration were obtained by the fraud and deceit of Dull and Ellicott, with the

knowledge of Shoemaker, and that the contract, award, and judgment were *were* void, and that it was entitled to have said judgment cancelled, and to have returned to it the amounts paid said Dull, Shoemaker, and Ellicott under it, and an injunction, &c.

The bill prayed an injunction and discovery, cancellation of the judgment, &c., and that Dull, Shoemaker, and Ellicott be decreed to refund the sums received by them under the judgment.

Preliminary injunction was granted by the State court, and the resident defendants were served with process and answered. Notice was published against the non-resident, Dull, and he ap-
139 peared and filed a petition for removal into the United States circuit court.

The petition of Dull sets forth that he is a citizen of Pennsylvania and that there is in the suit a controversy wholly between citizens of different States, which can be fully determined as between them, and that said suit is for the purpose of enjoining him and is a suit in which there can be a final determination of the controversy, so far as concerning him, without the presence of the other defendants.

The answer of Ellicott states that he never was directly in the employment of the company, but was employed by its chief engineer, Manning, to assist him during a year in which he was pressed with other duties; that he had nothing to do with the lettings or contracts for the work; that some time after the contract was made he was told by Shoemaker, who had previously evidenced a strong desire to assist him, that he was to receive one-third of the profits, and he offered to give him one-half of his one-third.

That he had received from said contractors in all the sum of $13,698 in full of his one-half of Shoemaker's one-third and as the gift of said Shoemaker.

That long after he had ceased to be in any way connected with said engineering work, being called upon to testify, he did testify before said arbitrators with regard to an unimportant fact, with regard to which any eye-witness could just as well have testified and upon which, he has been informed, the arbitrators did not
140 found their award, having neglected, as he is informed, the whole claim to which his testimony could have any reference.

That his testimony was true, and that if he had been questioned with regard to his interest in the matter in dispute he would have answered with frankness. He denies that his actions had in any way resulted in loss to the complainant or that he had been guilty of any fraud or breach of trust.

The answer of Shoemaker states that he had nothing to do with the contract until after it had been executed; that then the contractors proposed to him that he should have one-third of the profits and that he should advance them money as capital; that, being on terms of intimacy with Ellicott and desiring to befriend him, he offered him one-half of said one-third of profits without any fraudulent intention, compact, or arrangement whatsoever; that he understood Ellicott's employment by the chief engineer of the company

to be only temporary and not such as to affect the performance of the contract, and by offer to Ellicott had no reference to his relation to the company or expectation of advantage therefrom.

That he never participated in the conduct of said arbitration and knew nothing of any testimony given therein; that he had not in his possession or control any of the unpaid notes given in settlement of the judgment.

From the foregoing statement it will appear that the bill in substance charges that because, as it alleges, while Ellicott was
141 in the employment of the company he secretly became interested in the profits of the contract with Dull for the construction of the railroad, and because when a suit was instituted by Dull for additional compensation the said Ellicott, with the knowledge of Dull and Shoemaker, gave false and interested testimony, which enabled Dull to obtain a judgment against the company upon a false claim, that judgment ought to be set aside and Dull and Shoemaker and Ellicott decreed to refund the amounts received under it.

Upon the motion made by the company to remand the case to the State court the only question to be passed upon is whether there is in the case a controversy wholly between the company and Dull (the citizens of Pa.), which can be fully determined as between them.

As there is but one controversy in the case the solution turns upon whether or not the defendants Shoemaker and Ellicott (the two citizens of Md.) are necessary parties to the suit.

They are unquestionaly proper parties, but it is now settled by Barney *v.* Latham (Supreme Court, No. 192, Oct. 2, 1880) that, although they are proper parties, if they are not indispensable parties, the suit may be removed, and that the removal operates to transfer the entire suit and all the parties to it.

The judgment sought to be set aside is a judgment in favor of Dull alone, subject, perhaps, in the hands of Dull, to a trust
142 in favor of Shoemaker and Ellicott, or rather of Shoemaker alone, as Ellicott avers that he had been paid in full his share of it; but upon the theory and allegations of the company that is a trust based upon a corrupt bargain and could not be enforced by Shoemaker, and it appears that neither the judgment or any of the notes given in settlement of it have been transferred to him. The contract was between the company and Dull, and in the suit Dull is plaintiff and the company defendant.

It seems to us that, so far as relates to the relief of setting aside the judgment, neither Shoemaker nor Ellicott would be necessary parties. It is upon the validity of that judgment that the whole controversy hinges. If the facts connected with the obtention of that judgment are proved to be such that a court of equity should set it aside, then that controversy is fully determined with regard to everybody interested in it, whether parties to the suit or not, and Dull may be decreed to return the money paid under it.

Does it affect Dull's right of removal that, if that controversy is so decided, Shoemaker and Ellicott may also be decreed to restore

the money or any part of it? We cannot see that it does. It would rather seem to be a relief incidental to the determination of the real controversy, and not a part of the controversy. The theory of the complainant is that Dull, by bribing Ellicott through Shoemaker, obtained a judgment, the fruits of which, in equity and good conscience, he should not be allowed to have, and if, by rea-
143 son of the complicity of Ellicott and Shoemaker, restitution may also be decreed against them, it is only because of the full nature of the relief afforded in equity and not because they are indispensable parties to the controversy.

If the complaint was based upon the allegation that Dull had bribed one of the arbitrators, that arbitrator would be a proper party to a bill against Dull, but he would not be a necessary, much less an indispensable, party.

Order Overruling Motion to Remand. Filed 20 *June*, 1881.

In the Circuit Court of the United States for the District of Md.

UNION R. R. Co. OF BALTIMORE *vs.* DULL, &c.

It is hereby ordered, this 20th day of June, 1881, that the complainant's motion to remand this case to the State court be, and the same is hereby, overruled.

THOS. J. MORRIS.

144 *Order Overruling Exceptions to Answer. Filed* 2 *Dec.*, 1881.

In the U. S. Circuit Court, District of Maryland. In Equity.

THE UNION RAILROAD COMPANY *vs.* JAMES J. DULL *et al.*

Exceptions to answers.

Ordered, this 2nd day of December, 1881, that the exceptions of complainant to the answers of defendants be, and the same are hereby, overruled.

HUGH L. BOND,
C't Judge.

Motion to Dissolve Injunction. Filed 6 *Dec.*, 1881.

In the Circuit Court of the United States for the District of Maryland.
In Equity.

THE UNION RAILROAD COMPANY *et al. vs.* JAMES J. DULL *et al.*

To the honorable the circuit court of the United States in and for the district of Maryland:

The defendants, James J. Dull, Samuel M. Shoemaker, and John Ellicott, respectfully pray the court to dissolve the injunction in this cause heretofore granted.

I. NEVITT STEELE,
A. W. MACHEN,
Sol'rs for Dull, Shoemaker, & Ellicott.

145 *General Replication. Filed* 23 *Dec.*, 1881.

In the Circuit Court of the United States for the Fourth Circuit, in and for the District of Maryland. In Equity.

THE UNION R. R. CO. *vs.* JAMES J. DULL *et al.*

Mr. Chew, clerk, &c.:

Enter the general replication to all of the answers filed in the cause.

WILLIAM A. FISHER,
Solicitor for Complainant.

Order. Filed 23 *Feb'y*, 1882.

In the Circuit Court of the United States for the District of Maryland.

UNION RAILROAD COMPANY *vs.* JAMES J. DULL *et al.*

Ordered, this 23rd day of February, 1882, on motion of the solicitors of the defendant, James J. Dull, that the motion of defendants for a dissolution of the injunction heretofore granted in this cause by the circuit court of Baltimore city be set for hearing on
146 the thirtieth day of March next, with leave to either party to take testimony in the meantime, provided a copy of this order be served on the complainant's solicitor on or before the 25th instant.

HUGH L. BOND,
Circuit Judge.

"Service of copy of the within order admitted this 23rd day of Feb'y, 1862.

"MARSHALL, FISHER & WEST,
Solicitors for Complainant."

Order. Filed 22 *March*, 1882.

U. S. Circuit Court. In Equity.

UNION R. R. CO. *vs.* DULL *et al.*

Ordered that the time of taking testimony be extended to May 8th, 1882, and that the motion to dissolve injunction be set for hearing on the said day. The complainant's testimony shall be concluded by May 1st.

March 22nd, 1882.

HUGH L. BOND,
Circuit Judge.

147 *Agreement for Commission to Take Testimony. Filed 4 April,* 1882.

In the Circuit Court of the United States for the District of Maryland.

THE UNION RAILROAD COMPANY

vs.

J. J. DULL *et al.*

It is agreed that a commission to take testimony to be used at the hearing of the motion to dissolve the injunction in this cause be issued to G. Morris Bond, Esq.

And it is further agreed that any evidence taken under the said commission may also be used at the final hearing.

WM. A. FISHER,
Complainant's Solicitor.

MACHEN & GITTINGS,
Solicitors for Def'ts Dull, Shoemaker, and Ellicott.

Order. Filed 5 May, 1882.

In the Circuit Court of the United States for the District of Maryland.

UNION RAILROAD COMPANY *vs.* DULL *et al.*

148 Ordered this 5th day of May, 1882, that the hearing upon the motion to dissolve the injunction in this case be postponed to the first day of June next, either party in the meantime to be allowed to take evidence under the commission heretofore issued.

THOS. J. MORRIS, *Judge*

Order. Filed 7 Nov., 1883.

In the Circuit Court of the United States for the District of Maryland.
In Equity.

UNION RAILROAD COMPANY *vs.* DULL *et al.*

Ordered this 7th day of November, 1883, on motion of the defendants' solicitors and with the consent of the complainant's solicitors, that this cause be set for hearing on Saturday, the 5th day of January, 1884; and it is further ordered that the taking of testimony on the part of the complainant be closed on or before the 10th day of December, 1883, and that all the testimony be returned on or before the 20th day of December, 1883.

HUGH L. BOND,
Circuit Judge.

Commissioner's Return Testimony and Exhibits. Filed 3 January, 1884.

149 THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

[Seal of Court.]

The President of the United States of America to G. Morris Bond, Esq., commissioner named on the part of the complainants and defendants:

Know ye that you are appointed commissioner to examine witnesses in a case depending in the circuit court of the United States for the district of Maryland between The Union Railroad Company of Baltimore, complainants, *vs.* James J. Dull, Samuel M. Shoemaker, The Canton Company of Baltimore, & others, defendants.

Therefore you are requested, after having taken the oath hereunto annexed and also administered the annexed oath to the person whom you shall appoint as clerk to attend the execution of this com-
150 mission, that at such time and place as to you shall seem convenient you cause to come before you all such witnesses as shall be named or produced to you, either by the plaintiff or defendant, and that you examine them upon their corporal oaths, to be by you administered on the Holy Evangely of Almighty God, touching their knowledge or remembrance of anything that may relate to the cause aforesaid, and having reduced the depositions of witnesses so taken by you into writing, you send the same with this commission, closed under your hand and seal, to the said circuit court with all convenient speed.

Witness the Honorable Morrison R. Waite, judge of our said circuit court, at Baltimore, this fourth day of April, in the year eighteen hundred and eighty-two.

Issued the fourth day of April, 1882.

JAS. W. CHEW,
Clerk of our said Circuit Court.

Commissioner's Oath.

You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of these parties, take the examinations and depositions of all and every witness and witnesses produced and examined, by virtue of the commission hereunto annexed, upon the interrogatories now or which may hereafter, before the said commission is closed, be produced to and left with you by either of the parties—so help you God.

151 The above oath was waived by consent of counsel for both sides, the commissioner named herein being a duly appointed and sworn commissioner of the United States circuit court.

——— ———,
Counsel for Complainant.

——— ———,
Counsel for Respondent.

Complainant's Testimony.

THE UNITED STATES OF AMERICA, *District of Maryland.* } *To wit:*

First day.

I, George Morris Bond, a commissioner appointed by the circuit court of the United States for the fourth circuit, in and for the Maryland district, pursuant to the act of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," do hereby certify that on the twelfth day of April, in the year of our Lord one thousand eight hundred and eighty-two, at my office, in the city of Baltimore, within the district of Maryland, personally appeared before me Samuel M. Shoemaker, a witness for the complainant in a certain civil cause depending in the circuit court of the United States for the district of Maryland, in the matter of The Union Railroad Company of Baltimore *versus* J. J. Dull and others.

152 And the said SAMUEL M. SHOEMAKER, being by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and being examined on behalf of the complainant, makes oath, deposeth, and saith as follows, to wit:

My name is Samuel M. Shoemaker; I am about sixty years old, and reside in Baltimore county, Maryland.

1 Q. Do you know the parties to this suit?

A. I know most of them.

2 Q. You are yourself one of the defendants, are you not?

A. I am.

3 Q. Were you acquainted with the late William M. Wiley?

A. I was.

4 Q. Do you know when he died?

A. I could not tell the time without looking at some papers to refresh my memory. He died the fall before this case was decided.

5 Q. By what books and papers can you refresh your recollection, as stated in your answer?

A. I can look up his death in the papers. I suppose that would be the best way.

6 Q. You stated in a preceding answer that you could refresh your recollection as to Mr. Wiley's death by reference to books; to what books did you have reference?

A. Probably I used the word "books" without considering. I should have said, to refer to the papers of the day to refresh my memory. I have no books or anything of the kind now.

153 7 Q. How long have you known the defendant, James J. Dull?

A. I had no personal acquaintance with Mr. Dull until after this contract. I met him in the street and was introduced to him by Mr. Wiley. I knew him by reputation very well.

8 Q. By "this contract," in your last answer, do you mean the original construction contract between the complainants and Dull, Wiley and Andrews?

A. So far as I know, I had no knowledge of that contract at all at that time. Mr. Wiley, I think, brought him to see me, either at my house or office; I can't say which.

9 Q. How long had you known Wiley personally before his death?

A. I knew him for ten or fifteen years. He was contractor on the Northern Central railroad, and I knew him generally—met him at times.

10 Q. Were you a director in the Northern Central railroad at the time Mr. Wiley was contractor?

A. I presume I was.

11 Q. Had you had business transactions with Wiley previously to the contract for the construction of the complainant's tunnel?

A. I don't think I ever had any transaction with him previous to that time involving money.

12 Q. Had you had transactions with the firm of which he was a member previously to said construction contract?

A. I never had any transactions with them.

13 Q. Did you know, before the giving out of the contract for the construction of said tunnel, that Mr. Wiley was a bidder for it?

154 A. I may have learned incidentally from Mr. Wiley that he was a bidder, but I did not know anything further than that.

14 Q. Did Mr. Wiley see you before the contract was given out in regard to procuring capital from you in the event of his obtaining the contract?

A. I have no recollection that he did so; Wiley was looked upon as a man of means, and was a man of means.

15 Q. Did you have any correspondence with Mr. Wiley between the fall of the year 1870 and his death?

A. I have no recollection of having at that time had any correspondence with Mr. Wiley on any subject.

16 Q. Did you ever have any business transactions with Mr. Dull, with the exception of those relating to his contract for said construction?

A. I never had any business transactions with Mr. Dull of any kind until after the death of Mr. Wiley.

17 Q. Have you received letters from Mr. Dull?

A. Only received notes or telegrams from him saying he was coming to town, or something like that; he was a man who writes less than usual—less than Wiley.

18 Q. Did you write any letters to Mr. Dull?

A. Nothing more than that I would be here, or something of that sort; I have no recollection of it otherwise.

19 Q. Do you keep a letter-press copy of your letters?

A. I do not further than letters of the express company.

20 Q. Did you not have your letters copied when they related to your own pecuniary matters?

A. When I thought they were of sufficient importance, but I

wrote but few letters which I considered of sufficient im-
155 portance to have copied.

21 Q. Where are the letter-press book or books which contain any letters of yours between January 1st, 1875, and January 1st, 1879?

A. They have most likely been sold to the paper-mills for old waste, unless they were kept for some special purpose, of which I have no knowledge.

22 Q. Did you copy your private letters in the same book with letters of the Adams Express Company's business?

A. I did, so far as I recollect, if I had any letters to copy; it was very seldom I had any to copy.

23 Q. Do you mean to testify that it was the practice to sell letter-press books containing letters relating to the Express Company's business?

A. Oh, yes; of course it was—a thousand and one matters, inquiries, requests, &c.; they were no use.

24 Q. Have you sold, or ordered to be sold, any letter-books since the institution of this suit against you?

A. The regular order of the business of the company has, of course, gone on as usual since that, and I don't know whether any letters among these related to my business or not. I certainly would not sell letters to get them out of the way if I thought they would be of any use.

25 Q. The question is, not as to the regular business of the company, but whether you have ordered sales since the institution of this suit of any letter-books?

A. I have never ordered any special sale of the books with a view to covering up any papers. Mr. Herring has my orders to
156 make sale and dispose of the waste papers from time to time, though I never examined to see if he had done so, nor do I know whether any papers relating to my own private business are among them.

26 Q. Have you been in the habit of selling your letter-books containing letters in relation to your previous business without first examining to see what letters they contained?

A. I don't think I ever had any letters which required such close attention as that. The way-bills, &c., were something enormous; it would take this room to hold them, I guess; they were sold by Mr. J. Q. A. Herring, superintendent of the office.

27 Q. Do you mean to be understood as saying that Mr. Herring had authority from you and was in the habit of selling books containing letters in relation to your private affairs?

A. There were no books used except the regular books of the company, which were used to copy some of my private letters, and I have no recollection of any letters there copied relating to this matter.

28 Q. Had you any letter-press books at all separate from those of the company?

A. I had not.

29 Q. Have you made any examination to ascertain whether

you had any letters from Mr. Wiley, Mr. Dull, or Dull & Wiley, or John Ellicott, or copies of letters to any of the parties named?

A. I have generally looked through my papers and letters at various times during the past year and have found nothing at all relating to it.

157 30 Q. Did you make an arrangement with Mr. Wiley, or Dull & Wiley, to furnish capital to assist in carrying out their said construction contract for the tunnel?

A. I made no arrangement to lend them money. Mr. Wiley came to me when he wanted money from time to time, and I loaned it to him, but I had no arrangement to loan them based upon any contract or understanding had with them. Mr. Wiley's credit was good.

31 Q. When did Mr. Wiley first apply to you to find whether he could obtain money from you for the purpose?

A. He made no such application to me; he was a man in excellent credit, and could borrow all the money he wanted.

33 Q. What amount of money did Wiley, or Wiley and Dull, receive from you during the execution of said construction contract?

A. In regard to that contract, never any money. Mr. Wiley one day borrowed ten thousand dollars on his own note, which he paid. I think he borrowed this after the contract was made.

34 Q. Will you please explain what you meant in a former answer by saying that Mr. Wiley came to you from time to time, and you lent him money?

A. I only meant that his credit was good, and I would lend him money. I had lent him ten thousand dollars.

35 Q. Do you mean to state that you furnished no money to assist in carrying out said tunnel contract?

A. To the best of my belief, I did not.

36 Q. Did you make no advances to Dull & Wiley?

A. None at all.

158 37 Q. Did you ever have an interest in the profits of said contract?

A. Not any; the only interest I had, or could be supposed to have, was what Mr. Wiley chose to pay me. I never examined the books or accounts in any way, or knew what he received or what he paid out.

38 Q. I read to you the following portions from your sworn answer filed in this case: "Some time after the said proposals had been put in, and the contract for the construction of the said tunnel of the complainant, made between the said Dull, Wiley and Andrews and the complainant, the said Wiley proposed to this respondent that he should have a one-third interest in the profits to be made under the said contract, this respondent being expected to contribute some money in the nature of capital." Was that statement in your answer true?

A. It was at that time—yes. I don't know when this conversation was had; it was a good while after the contract was made. It

was a casual conversation in my office. I never was called on to pay such money, and never paid any.

39 Q. I read further from your answer: "He (meaning myself) therefore immediately acceded to said Wiley's proposition aforesaid." Is it the fact that you did accede to it?

A. I don't know that I acceded to it that day, but I think it was done within a few days afterward.

40 Q. Did you have an interview with John Ellicott between the time the proposition was made to you and the time you acceded to it?

A. I have no recollection of such interview.

159 41 Q. Did the firm of Dull, Wiley and Andrews receive any money from you?

A. They never received a dollar that I know of. Mr. Wiley borrowed $10,000, I think, that summer, and gave his note for it; that was a loan to him.

42 Q. Was the said agreement with Wiley for your one-third interest in the profits made before or after the making of said loan of $10,000 to Wiley?

A. Without being certain, I am under the impression that the offer of the interest was made to me in May or June of the year of which the contract was made, and the loan was, I think, in July; I think he was going away on some excursion.

43 Q. Will your books show just when said loan was made?

A. Certainly. I don't think that this has anything to do with this thing in any shape or way.

44 Q. Who kept your books at that time?

A. David Keener, I guess.

45 Q. The summons to you as a witness required you to bring with you your ledger and other books containing entries of moneys, &c. Have you brought any such books?

A. No, sir.

46 Q. Will you produce them at the next meeting of the commission to take testimony?

A. My books are kept peculiarly, and bringing before you books in relation to my private affairs I don't think will interest you an iota; they have no relation to this case at all.

160 47 Q. In what books will appear the entries in relation to said $10,000?

A. In my check-book and bank-book; the bank-book is there, doubtless, but it is out of use. The stubs of the check-book are there, I think, but I don't know. They were of no particular value to me, and may have been thrown among the other mass of paper.

A. I don't know.

48 Q. Is Mr. Keener still in your employment?

A. He is not; he is with his brother-in-law, I think.

50 Q. Was there not a ledger kept by Mr. Keener?

A. None other than a single-entry ledger, and one kept for Mr. Shoemaker.

51 Q. Will not said ledger of yours show the date of the transaction with Mr. Wiley?

A. It would not.

52 Q. Did you not have a bills-receivable account in such ledger?

A. I did not; I kept the bills receivable in a little memorandum book with the bank-book, and when it was paid it was carried to the credit of the check-book.

53. You have stated in the first portion of your answer, which I read to you, that you were expected to contribute some money in the nature of capital. Why was it that you made a loan to Mr. Wiley after that in place of contributing capital according to the arrangement you have stated?

A. I don't know whether he borrowed that money for himself or for the company; I never asked him, and he never told me.

54 Q. I understand the result of your several answers to be that you never, to your recollection, contributed any money in the
161 nature of capital or made any advances to Dull, Wiley and Andrews, Dull & Wiley, Wiley, Dull, or Andrews, with the exception of a single loan to Wiley. Am I correct in so understanding you?

A. Dull, Wiley, and Andrews I never knew at all, nor never advanced money or loaned them in any shape or form, and the same answer as to Dull & Wiley, nor ever signed any paper of any kind; there was a paper drawn, I believe, but never executed, and I don't know what became of it. As to Mr. Wiley I lent him $10,000 on his own note, which was duly honored when it became due, which I can't see has anything to do with this business. I made no other advances to any of them.

55 Q. Had Andrews retired from the contract at the time you made your arrangement with Mr. Wiley for one-third profits?

A. I never knew anything about Mr. Andrews at all.

56 Q. Why did you never make any contribution in the nature of capital?

A. They never called on me for any money, and I never considered myself a partner, nor do I believe they did; it was Wiley's gift—I presume for the purpose of increasing his credit. I had nothing to do with the work—never went near it, nor gave an order about it in any way, shape, or fashion.

57 Q. What reason did Mr. Wiley assign when he offered you the one-third interest?

A. I can hardly recollect what his conversation was; we had a great deal of conversation, and he made me the proffer, and I don't know whether I refused or accepted that day.

162 58 Q. You have stated that you supposed the offer was made with a view to increase his credit. In what manner was his credit to be increased by giving you such interest?

A. That was for him to settle, not to me; at that time all men were not looked upon with a friendly eye, so far as I know.

59 Q. I call your attention to the fact that you stated your own impression that the offer was made to increase his credit. How did you understand that he expected to increase his credit—by giving you said one-third?

A. That he referred many persons here to me and I spoke of his

character to them and his ability to pay his debts. I had known him, in a political point of view, for many years, and he was as warm a personal friend of Mr. Simon Cameron as I was, although a Democrat.

60 Q. You would have made the same statements as to his character and ability if you have been inquired of without the gift of the one-third interest as well as with it, would you not?

A. I should have done so, I think, beyond a doubt, but he made this offer to me long after the contract was made, and I saw no reason for it, as I said, and I did not consider myself a partner, nor interested in his debts in any way, nor do I now.

S. M. SHOEMAKER.

The further examination-in-chief of this witness was, by
163 consent of the respective counsel, adjourned to April 14th, *and* the same place, at eleven o'clock in the forenoon.

14TH APRIL, 1882.

Examination-in-chief continued:

61 Q. Have you with you any book by which you can state positively on what day the $10,000 loan was made?

A. I have not found any entry of that loan, because it was made to Wiley, and not in this business at all, and seems to have been prior to this business, but I find that on June 28th, 1871, I gave Mr. Wiley a check for $8,333.33. The entry of the transaction on the margin of my check-book is as follows: "June 28th, 1871 (No. of check), '1827,' paid W. M. Wiley, Esq., my part of subscription to contract to build Union Line R. R., $8,333.33."

62 Q. Did Messrs. Dull & Wiley, respectively, at that time contribute a like amount of money towards said building?

A. I never saw their book, but I was so informed by Wiley, and have no doubt it was so.

63 Q. Am I correct in my understanding of your 61st answer that the loan of $10,000 was made before you accepted the one-third interest, and how far back have you gone in your books to find said loan?

A. It was made, I think, two years before—I can't be certain; I find my memory is defective about all these things—I thought it was correct. I went back to April 14th, 1870, and I cannot find it.

164 64 Q. How long after you accepted the one-third interest was it that you paid him the $8,333.33?

A. It must have been a couple or three months; I can't say; I find my memory is so defective about these things. Mr. Wiley would come into my office some two or three times a week sometimes—he was a visitor there—and they would give him a chair and the papers, and he would sit there and go in and out when he pleased.

65 Q. When did you receive the first sum from the profits of the transaction?

A. The first money I received on account of any profits on the

Union tunnel was $2,500, which came to me on July 16th, 1873. The entry is as follows:

"Received cash from W. M. Wiley, ac't of Union tunnel, $2,500."

66 Q. In whose handwriting is said entry?

A. In my own.

67 Q. When was the next sum received?

A. The next sum which was received was $10,000. The entry on the stub of my check-book relating to it is in the handwriting of Mr. Keener, my clerk, and is as follows:

"1873, September 15th. Dep't (meaning deposit) note of Union R. R. Co., paid. 10,000" (meaning $10,000).

68 Q. When was said note deposited for collection?

A. It was deposited on July 22nd, 1873. The entry in my collection book with the bank is "July 22nd, Union R. R. Co., 10,000."

165 69 Q. When was the next sum paid on account of said profits?

A. On February 12th, 1878. The entry in the stub of my check-book, in the handwriting of Mr. Keener, is as follows:

"Feb. 12th. J. J. Dull, ac't W. M. Wiley, 1,050.53."

70 Q. Was said last-named sum a cash payment, or the proceeds of a note?

A. My impression is it was by check; there was no note about that.

71 Q. Did you receive any of the notes of the Union Railroad Company of Baltimore, given by it in order to settle the judgment rendered upon the award made by Messrs. Tyson, Whitcomb, and Martin, mentioned in the proceedings?

A. I never received any.

72 Q. Do you know who holds the unpaid notes?

A. Oh, I take it Mr. Dull does; it was his duty to do so.

73 Q. For what part of the profits were said sums paid to you?

A. I actually don't know anything about it. This man kept the accounts, and I never looked at them. I can't say positively; I suppose it was one-sixth.

74 Q. Who kept the accounts?

A. Mr. Wiley up to his death, and I suppose Mr. Dull afterwards.

75 Q. Why do you suppose the payment was for a one-sixth of the profits?

A. Because, in my opinion, that was due me.

76 Q. Why not one-third of the profits?

A. I did not own one-third.

166 Q. 77. Why did you not own one-third?

A. I told Mr. Wiley that I only wanted one-sixth, and I gave him the other to do as he chose with it. I think he give it to John Ellicott, but I don't know certainly.

78 Q. Did not both Mr. Wiley and Mr. Ellicott tell you that the other one-sixth was paid to, and received by, Mr. Ellicott?

A. I don't recollect.

79 Q. Was it not at your instance that the one-sixth of the profits were turned over to Mr. Ellicott?

A. I recollect telling Wiley that he could pay Ellicott one-half of what was due me; that was some months after the contract was made with the Union Line railroad, according to my recollection.

80 Q. Do you allude to the construction contract in your last answer?

A. I do.

81 Q. Did Mr. Ellicott pay you anything for the one-sixth interest, or pay anything to Dull & Wiley, so far as you know?

A. So far as I know, he never paid anything; it was a gift from me to him. My only reason was he was very poor and wanted money very badly.

82 Q. If he wanted money at the time very badly why did you not give him money and not an interest, which might not, and in fact did not, bring in any cash for several years?

A. I don't, in fact, know what influenced me at the moment.

83 Q. Had you ever made a gift to Mr. Ellicott before; and, if so, when and where?

A. I may have given him some money, and may not; he did work for me, and I have paid him a couple of thousand dol-
167 lars, from time to time, for the work, and he occupied my house for one or two summers.

84 Q. If you made Mr. Ellicott any present before the said gift of an interest in said profits, did you ever give him as much as $500?

A. I don't think it is likely that I gave him that much at any one time; he was an old boy friend of mine and came back here very poor.

85 Q. Have you made any gift to Mr. Ellicott since the said gift of an interest in said profits?

A. I don't think I have very lately.

86 Q. Can you say, as a matter of fact, that, with the exception of the interest in said profits, you ever made Mr. Ellicott a present of any money in your life?

A. I could not answer that question; I don't know what I did with money in my pocket at any time; I don't recollect.

87 Q. What did Mr. Wiley say when you told him to turn over to John Ellicott one-half of the one-third of the profits?

A. We had a great many talks; I don't recollect now what he said.

88 Q. Was there any certainty as to what the profits would be, or did they depend upon the contingencies of the work?

A. I never knew any contract in which there was a certainty of anything. Mr. Wiley had excellent judgment, and I supposed I could rely upon what he would do about it. He had the whole charge, and I did not interfere with him in any way.

168 89 Q. You speak of Mr. Ellicott having occupied your house in town for one or two summers; was any work being done upon your said house at that time?

A. None that I know of.

90 Q. You also spoke of having paid Mr. Ellicott some $1,000 or $2,000, for services rendered by him to you; were they for services as architect for some of your buildings?

A. They were; I was building a large house in the country and other things.

91 Q. How recently—before the gift to him of said interest in profits—had he been in such employment last?

A. I suppose the year before; I don't know exactly.

92 Q. Were you in the winter of 1870 and the spring and summer of 1871 on terms of close intimacy with said John Ellicott?

A. I have never been on any other than pleasant terms with Mr. Ellicott, and was at the time mentioned.

93 Q. I read to you a clause from your sworn, answer as follows: "The relations between this respondent and him" (meaning John Ellicott) "at and about the commencement of the railroad construction aforesaid were more than usually close and friendly." Does that statement truly describe the relations then existing between you?

A. It is impossible for me to recollect dates, but I presume about that date he kept pretty sober, but after that time he took to drink and I had not much to do with him.

169 94 Q. I read you a further statement of your answer, immediately following that last quoted and forming part of the same sentence: "And when the said Wiley, unexpectedly to this respondent, proposed to allow him an interest of one-third in the profits from the said contract, this respondent, without attempting to estimate the probable amount of such share of profits, and in fact wholly uncertain whether there would be any profits or not, mentioned the fact of said Wiley's promise aforesaid to said Ellicott, and at the same time told him that if anything came of it he would let him (Ellicott) have one-half of what this respondent should so receive." Was said conversation with Ellicott in the interval of which you have spoken between Wiley's offer and your acceptance of it?

A. It is most natural that such a thing should be, but the thing has passed from my mind.

95 Q. Did not Mr. Wiley, in his conversation with you, when he proffered the one-third interest, give you any estimate of what he supposed would be the profits of the contract?

A. I don't recollect that he did. He very likely said something about it, but it made no great impression on my mind at the time.

96 Q. Do you know Mr. William G. Harrison, of this city?

A. I do; I have known him for about forty-five or fifty years.

97 Q. Was he the president of the Union Railroad Company in the years 1870 and 1871, and from thence on?

A. As far as I know, he was.

170 98 Q. Did you go to Mr. William G. Harrison's office and have an interview with him, in the summer or fall of 1870, in which you gave to said Harrison your assurances of the capacity

of Mr. Ellicott for any of the engineering services of said company?

A. I have no recollection of having gone for any such purpose as that. I did call on him in relation to Mr. Wiley and tell him of his fitness and capacity.

99 Q. Have you no recollection of going to Mr. Harrison at any time at the instance of Mr. Ellicott for such purpose?

A. No, sir; I have not.

100 Q. How long before the contract was given out was it that you went to Mr. Harrison on behalf of Mr. Wiley?

A. I could not recollect definitely, but I think a short time before the contract was given out.

101 Q. What induced you to make that visit?

A. I knew Mr. Wiley very well and knew he desired to become interested in building the tunnel, and I had probably talked the matter over with him. I think there were other (directors) managers there besides Mr. Harrison, and I thought the conversation would do Mr. Wiley good. I have no recollection of it; it has escaped my mind entirely.

102 Q. You stated in your previous examination that the motive for proffering you a one-third interest, as you believed, was to establish Wiley's credit by your speaking well of him. Please try to recollect whether the interview last mentioned with Mr. Harrison did not follow upon said promise by Wiley and whether you did not go there to establish his credit.

171 A. Oh, no; it was long after that that it was talked of—my becoming interested in it. I merely did so as a matter of personal friendship for Wiley.

103 Q. Have you made since the last examination or caused to be made any further examination to learn whether any correspondence is in existence between you and any of the parties to the cause?

A. I had previously. I have not since.

Cross-examined:

1 X Q. Does the margin of your check-book afford any evidence of the return of the $8,333.33 paid to W. M. Wiley on June 28th, 1871?

A. I find on the margin of my check-book, at the date of about March 3d, 1873, the following entry as of cash received, to wit:

" Dull & Wiley, $8,833.33 *d.*
" do. 1,388.87."

These entries are in my handwriting. In regard to the item of $1,388.87, there is a floating notion in my head that each of the contributors received interest on the money advanced by them.

S. M. SHOEMAKER.

(The said witness, Samuel M. Shoemaker, at this meeting under the commission, produced his check-books containing the stubs covering the period of the years 1870 to 1873, inclusive, and also the

check-book covering the year 1878 and his bank collection
172 book, and the extracts above mentioned in his testimony were taken therefrom.)

I, George Morris Bond, a commissioner as aforesaid, do also certify that the reason for taking the foregoing deposition of Samuel M. Shoemaker was and is, and the fact was and is, that the said deponent was examined in pursuance of the commission hereunto annexed.

And I also certify that the deponent was by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and that the foregoing deposition was then reduced to writing by me, and thereafter subscribed by the said deponent in my presence; and I do further certify that I am not of counsel or attorney for either of the parties to the said cause, and that I am not interested in the event of the said cause.

Given under my hand and seal at the city of Baltimore, within the district of Maryland, this fourteenth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] GEORGE MORRIS BOND,
U. S. Commissioner of Maryland.

173 17TH APRIL, 1882.

JOHN C. WRENSHALL, a witness for complainant, being by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and, being examined on behalf of the complainant, makes oath, deposeth and saith as follows, to wit:

My name is John C. Wrenshall; I am forty-eight years of age; reside in Baltimore city, and am a civil engineer and railroad manager. I am general manager of the Union railroad at the present time.

1 Q. Are you acquainted with the parties to this cause?

A. I am, except J. C. Bumberger.

(It is here agreed between counsel that the transcript of the record of the case of James J. Dull, surviving partner of William M. Wiley, against the Union Railroad Company of Baltimore, in the Baltimore city court, contained in the record in this case shall have the same effect as evidence as if a transcript of the proceedings in said cause, duly certified, were filed by the complainant before the commissioner.)

2 Q. How long have you been in the employment of the Union Railroad Company of Baltimore, and how long have you been its general manager?

A. I have been in their employ since the 20th of December, 1870. I have been their general manager since July, 19th, 1873.

174 3 Q. When was the construction of the tunnel of the said company begun by Dull, Wiley and Andrews?

A. To the best of my recollection, in May, 1871.

4 Q. When was the work finished?

A. In the spring of 1873.

5 Q. In what capacity were you originally employed by said company?

A. I was employed originally as an assistant engineer to run the lines and arrange the levels.

6 Q. By whom were you employed and from whom did you receive said orders?

A. I was first employed by General John Ellicott; I also received my orders from him.

7 Q. Was said Ellicott in the employment of said company at said time?

A. He was the principal engineer when I went into their service and appeared to have charge of everything.

8 Q. Were there other assistant engineers at that time in the service of said company?

A. Mr. Kenly was appointed resident engineer of the company in January, 1871.

9 Q. Was there any person in the service of said company at that time who was designated as the "chief engineer?"

A. Mr. Charles P. Manning was chief engineer.

10 Q. Was Mr. Manning in the city of Baltimore and in actual charge during the early part of your service; if not, where was he?

A. He was but seldom in the office in the early days of the
175 work, being employed on what was known as the Baltimore Short Line of Ohio.

11 Q. Are you familiar with the handwriting of John Ellicott; have you seen him write frequently?

A. I am familiar with his handwriting and have seen him write frequently.

12 Q. Look at the papers now shown, dated, respectively, in the months of January, February, March, April, May, June, July, and August, 1871, filed as Complainant's Exhibit J. C. W., numbers 1, 2, 3, 4, 5, 6, 7, and 8, and state whether they are produced by you from the custody of said railroad company.

A. They are.

13 Q. In whose handwriting are the words "John Ellicott, engineer in charge," at the head of the paper No. 1, and the signature, "John Ellicott, engineer in charge," at the bottom of said paper?

A. They are both in the handwriting of General John Ellicott.

14 Q. In whose handwriting is the signature of "John Ellicott, associate engineer," on papers numbers 2, 3, 4, 5, 6, 7, and 8, of said exhibit?

A. They are all in the handwriting of General John Ellicott.

15 Q. Look at the papers now shown you, marked Exhibit J. C. W., numbers 9, 10, 11, 12, and 13 and 13½, and state whether they are produced by you from the papers of said company, and in whose handwriting are the signatures thereto attached.

176 A. They are from the custody of the company, produced by me, and the signature of Charles P. Manning is in his own handwriting while the signature of John Ellicott is in the handwriting of John Ellicott.

16 Q. Please look at the check now shown you, dated August 1st,

1871, and state whether it is a paid check of your company and in whose handwriting is the endorsement on the back thereof, and state, if you now know, for what said check was given.

A. This check, which I now produce from the records of the company, and which is marked Complainant's Exhibit J. C. W. No. 14, is a paid check of the company endorsed by John Ellicott, and, so far as I know, for services to him as engineer.

17 Q. Look at the letter now shown you, marked Complainant's Exhibit "J. C. W." No. 15, and state in whose handwriting it is, whether it was received by John Ellicott, and whence it is produced and by whom.

(Objected to.)

A. It is produced from the records of the company; is in the handwriting of William G. Harrison, president. I presume it was received by John Ellicott, but it antedates my entrance into the company.

18 Q. Please look at the papers now shown you, marked Complainant's Exhibits J. C. W., numbers 16, 17, and 18, being a letter, check, and bill, and state in whose handwriting is said letter, whether the bill now attached is the one which came with the letter, and in whose handwriting is the endorsement on the check.

177 A. The papers are from the records of the company; the letter in the handwriting of John Ellicott; the bill is from the treasurer's statement set opposite this check, and the endorsement on the check is in the handwriting of John Ellicott.

19 Q. Do you know whether the bill referred to in the last question came with the letter therein mentioned?

A. I can only presume so, the letter being addressed to Mr. Harrison and not to myself. I know the bill was paid with that check.

20 Q. State, if you know, what was the purpose of the carriage ride mentioned in the bill, Exhibit No. 16.

A. To the best of my recollection, it was to meet the engineer of the Philadelphia, Baltimore & Wilmington railroad near what is now known as Bay View station.

21 Q. For what purpose was said meeting and were you present?

A. We went there by appointment to arrange for matters connected with the crossing of and connection with the Philadelphia, Wilmington & Baltimore road. I think there was also some question relating to the Trappe road.

22 Q. Can you, from memory, state about the time said meeting occurred?

A. I could not exactly state; it was in hot weather, somewhere about the summer of the year 1871, according to my recollection.

23 Q. To whom did you and Kenly make report of the work done by you in running lines and levels as preliminary to the giving out of the contracts for the construction?

178 A. When Mr. Manning was present we reported to him; otherwise to General John Ellicott.

24 Q. Was Mr. Manning often present to receive your report between the time you began and the 1st of May, 1871?

A. He was but seldom present up to the time the work was let.

25 Q. Can you give the date of the letting?

A. I only recall the date of the contract with Dull, Wiley and Andrews. I can't tell exactly the date of the letting, but it was a few days before that.

26 Q. Who prepared and tabulated the information to be furnished to the bidders?

A. It was prepared by the corps of engineers, under the general supervision of General John Ellicott. Mr. Manning was there but seldom.

27 Q. Who prepared the contract to be executed by the contractors when the bids were given out?

(Objected to.)

A. As far as I can recollect, it was prepared by General Ellicott—in the main, I would say.

28 Q. With whom did the bidders, or persons who thought of bidding, have their interviews when they came to the office before the letting?

A. With the chief engineer, associate engineer, and myself.

29 Q. Were there many persons who came there with reference to the letting?

A. The bidders' list, to my recollection, numbered, I think, about sixty persons, but some of them were by letter.

J. C. WRENSHALL.

Further examination adjourned to the 25th April, 1882.

25TH APRIL, 1882.

179 30 Q. In your twenty-eighth answer you stated that the bidders held their interviews with the three engineers there named. Do you mean that they saw the three parties together, or explain what you did mean by that answer?

(Objected to, unless witness confines his testimony to personal knowledge.)

A. I mean that they saw, during the several days they were getting their information, whoever was in the office; sometimes one, sometimes another, and sometimes all three.

31 Q. During the time that the bidders were coming to the office, were your duties of a character requiring you to be in the office?

A. My duties required me to be there, and I was there.

32 Q. When John Ellicott was in the office during those days, in the absence of the chief engineer, did he usually have his conversations alone with the bidders, or did he usually call on you?

A. I was only called on to explain the section and quantities of the tunnel which I had made and placed upon the wall.

33 Q. By whom was the contract for the construction of the tunnel section, as subsequently executed by the complainant and Dull, Wiley and Andrews, drawn?

A. The blank printed form was prepared substantially, in the absence of the chief engineer, by General Ellicott.

180 (It is here agreed between the respective counsel that the commissioner shall make a copy from the articles of agreement between James J. Dull, William M. Wiley, and R. Snowden Andrews, of the first part, and the Union Railroad Company, of the second part, dated May 1st, 1871, from the copy filed in the case of James J. Dull *vs.* said company in the Baltimore city court, such copy to indicate what portions are printed and what written, respectively, said copy to be admitted without further proof of execution.)

34 Q. Have you made any examination since the last sitting in order to ascertain whether you were correct in the impression heretofore stated by you that the check "J. C. W. No. 14," heretofore produced, was for John Ellicott's salary?

A. I have made the examination; the check does not include the salary; it is for engineering expenses and the pay-roll for the assistants.

35 Q. Look at the two bills now shown you, marked Complainant's Exhibits J. C. W., Nos. 19 and 20, and state what they are, from whose custody they came, and by whom they are signed.

A. They are the bills and vouchers for the salary of the chief engineer. No. 20 includes the pay of the associate; the other is for the pay of the chief engineer alone. They are from the records of the complainant, in the handwriting of and signed by Charles P. Manning.

36 Q. While John Ellicott was acting as associate engineer did you or, to you knowledge, any of the officers or employees of
181 the company (the complainant) have knowledge that John Ellicott or any other person was interested in the profits of the tunnel contract with Dull, Wiley and Andrews?

A. I had no such knowledge, either for myself or others.

37 Q. How did it come to the knowledge of the Union Railroad Company that Shoemaker and John Ellicott were so interested?

(Objected to.)

A. Through the testimony given in a suit in Philadelphia, in which Mr. Kenly was a witness; he reported the testimony to the president and myself.

38 Q. Was it before or after the award had been made by the arbitrators and the settlement in reference to the judgment on the award by the issue of the notes by the Union Railroad Company that such knowledge was obtained by the company?

A. It was afterwards.

39 Q. Was John Ellicott examined as a witness before Messrs. Whitcomb, Tyson, and Martin, the arbitrators, and by whom was he called?

A. He was examined and was called by the contractors.

40 Q. You say "by the contractors." Mr. Dull was the only party, was he not?

(Objected to.)

A. That is what I meant by my answer.

41 Q. Was there any question put to John Ellicott and answered by him which raised the issue of veracity between him and yourself and Mr. Manning; and, if so, what was it?

A. The question was as to the identity of a drawing being the section—plan of the tunnel.

182 42 Q. Well, what issue of veracity was raised between you?

A. The question was whether that was the drawing from which the contractors derived their information which was to guide them on their bidding on the work. I testified to that drawing and its having been placed on the wall by myself and explained by myself to the contractors; he testified to there being another drawing of which I had no knowledge.

43 Q. Did he deny your statement that the drawing produced by you was the one hung upon the wall and shown to the bidders?

A. That is my recollection of his testimony.

44 Q. Did such conflict give rise to any angry controversy before the arbitrators?

(Objected to.)

A. Not so far as I was concerned.

45 Q. Did it, so far as others were concerned?

A. There were sharp denials occurred during the testimony.

46 Q. By whom was the written portion of the printed contract of May 1st filled in?

A. By myself.

47 Q. Was it done under the direction of any one; and, if so, of whom?

A. Under the direction of the chief engineer, to the best of my recollection.

J. C. WRENSHALL.

(It is here admitted by counsel that Mr. Henry Tyson, one of the arbitrators, is dead.)

183 27TH APRIL, 1882.

Cross-examined:

1 X Q. At the close of your first examination on April 17th, 1882, I requested you to produce the chief engineer's receipts subsequent to those which had been offered in evidence by the complainant; you have since produced Exhibits "J. C. W.," No. 19 and No. 20. Have you other receipts for the year 1871?

A. I have receipts for October, November, December, 1871, and January, 1872.

2 X Q. Please produce the receipt for October, 1871, and say whether or not the succeeding monthly receipts were of like tenor, with the necessary changes of dates?

A. I now produce the receipt. The others are the same, with necessary changes of dates.

3 X Q. Did Mr. Manning continue to receive the yearly salary of $5,000 afterwards?

A. I am not aware of any change in his salary.

4 X Q. How was the monthly installment of the salary of the chief engineer paid—in money or checks; and, if by checks, to whose order were the checks drawn?

A. By check; when the chief engineer was present, to his order; when absent, to the order of the associate engineer.

5 X Q. One check was drawn for the entire monthly salary?

A. That is my recollection.

6 X Q. Mr. Manning then received from the company monthly the same amount of salary, and the company paid the same sum, whether a part of it was to go to Mr. Ellicott or not; is that so?

184 A. Vouchers indicate that fact.

7 X Q. Then it made no difference to the railroad company, pecuniarily, whether Mr. Manning employed Mr. Ellicott to assist him or not; that is so, is it not?

A. Pecuniarily it made no difference.

8 X Q. Did you have any part in the engineering work on the tunnel after the letting of the work to the contractors?

A. I did. I prepared several of the plans—mostly the masonry. I took the chief engineer's place during his long illness; that must have been in the spring of 1872.

9 X Q. When were the proposals for the work advertised for and when were they put in?

A. The advertisements for proposals were dated March 15th, 1871, and first published on the 16th of March, 1871, and called for the bids up to the 23rd inst.

10 X Q. At the time of the advertisement for proposals were the forms of the articles of agreement and specifications and of the proposals completed and in print?

A. They must have been ready at that time, as they were forwarded to such contractors as answered the advertisement by letter.

11 X Q. Then the preliminary work referred to in your answer to the 23rd interrogatory-in-chief was all done, I suppose, before the 15th of March, 1871?

A. The work referred to in that must have been done previous to that time.

12 X Q. You have been asked in the course of your examination-in-chief with regard to Complainant's Exhibit J. C. W. No. 15 if the work upon the tunnel mentioned in it was done under

185 the contract of Dull, Wiley & Andrews; how do you explain the date of the said document?

A. The work was not done by Dull, Wiley & Andrews, but by John Clark—Union Railroad Company of 1868; I mean by that the former administration.

Further cross-examination adjourned — 30th October, 1882.

OCTOBER 30TH, 1882.

13 X Q. Have you one of the original forms for proposals issued to persons who contemplated, or were supposed to be contemplating, becoming bidders for the work in question, referred to in your an-

swer to the 10th cross-interrogatory? If you have, please produce it, and say whether they were all like that.

A. I hand now to the commissioner a blank copy of contract. There were no other copies used; they were all like this.

(Copy is here filed as Exhibit "Proposal.")

14 X Q. The proposal was annexed to the specifications and contract blank, it appears?

A. They were.

J. C. WRENSHALL.

I, George Morris Bond, a commissioner as aforesaid, do also certify that the reason for taking the foregoing deposition of John C. Wrenshall was and is, and the fact was and is, that the said deponent was examined by consent of counsel, and by virtue of a commis-
186 sion to me issued out of the United States circuit court; and I do also certify that the deponent was by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and that the foregoing deposition was then reduced to writing by me, and thereafter subscribed by the said deponent in my presence; and I do further certify that I am not of counsel or attorney for either of the parties to the said cause, and that I am not interested in the event of the said cause.

Given under my hand and seal, at the city of Baltimore, within the district of Maryland, this thirtieth day of October, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] GEORGE MORRIS BOND,
U. S. Commissioner for Maryland.

187 17TH APRIL, 1882.

JAMES SCOTT, a witness for complainant, being by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and being examined on behalf of the complainant, makes oath, deposeth, and saith as follows, to wit:

My name is James Scott; I am forty-six years of age; a resident of Baltimore county, and am discount clerk at the National Mechanics' Bank.

1 Q. Did your bank receive two notes drawn by the Union Railroad Company of Baltimore, dated February 7th, 1877, payable twenty-four months after date at the Franklin Bank of Baltimore, one for $14,000 and one of $993.14; if so, from whom did you receive them; for what purpose; where are the notes now, and will you produce them, that the commissioner may attach copies of them to your deposition?

A. It did; on January 8th, 1879, from J. C. Bomberger, the cashier of the Mechanics' Bank at Harrisburg, Pennsylvania, for collection for account of that bank; the notes are still in possession of the National Mechanics' Bank of Baltimore and remain unpaid, the bank having been enjoined in this case from the collection of them. I now produce the notes referred to, in order that copies may be taken of them.

JAMES SCOTT.

I, George Morris Bond, a commissioner as aforesaid, do also
188 certify that the reason for taking the foregoing deposition of James Scott was and is, and the fact was and is, that the said deponent was examined in pursuance of a commission to me issued in this case.

And I do also certify that the deponent was by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and that the foregoing deposition was then reduced to writing by me and thereafter subscribed by the said deponent in my presence; and I do further certify that I am not of counsel or attorney for either of the parties to the said cause, and that I am not interested in the event of the said cause.

Given under my hand and seal, at the city of Baltimore, within the district of Maryland, this seventeenth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] GEORGE MORRIS BOND,
U. S. Commissioner for Maryland.

189 17TH APRIL, 1882.

CHARLES J. BAKER, a witness for complainant, being by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and being examined on behalf of the complainant, makes oath, deposeth, and saith as follows, to wit:

My name is Charles J. Baker; I am about sixty-six years old; am a resident of Baltimore county, Maryland, and am president of the Franklin Bank.

1 Q. Were you president of the Canton Company of Baltimore from the year 1870 to 1875?

A. I was; from January 1st, 1870, to June, 1877.

2 Q. Was the Canton Company interested in the the Union Railroad Company of Baltimore; and, if so, in what manner?

A. It was very largely interested, and subscribed for the entire amount of the stock except a few shares; 5,940 shares out of 6,000 shares they subscribed for.

3 Q. Were you a director in the Union Railroad Company during the period during which you were president of the Canton Company?

A. I was.

4 Q. Where was the office of the Union Railroad Company from the year 1870 up to 1876?

A. It was over the Franklin Bank; during those years I was president of the Franklin Bank.

5 Q. Were you taking an active interest in the affairs of the Union Railroad Company, and especially what was going on in the
190 office of said company, at the time the surveys were being made for the work, the reception of bids from bidders, the giving out of the contracts, and during the period when the work of constructing the tunnel was going on?

A. I took especial interest in the railroad, and was in the office

every day during the time, except from about the 1st of May, 1871, to the 10th of October, 1871, when I was in Europe.

6 Q. While you were in Baltimore was there anybody who paid closer attention to all the business of said railroad company than yourself?

A. William G. Harrison and myself took especial interest in it.

7 Q. Was Mr. Harrison the president of said company during all said period?

A. He was.

8 Q. Did you, or so far as you know the president or any other person connected with the said railroad company, have knowledge that Samuel M. Shoemaker or John Ellicott had any interest in the profits of the contract made with Dull, Wiley and Andrews for the construction of said tunnel?

A. I had no knowledge, nor do I know of any one who had the knowledge.

CHARLES J. BAKER.

I, George Morris Bond, a commissioner as aforesaid, do also certify that the reason for taking the foregoing deposition of Charles J. Baker was and is, and the fact was and is, that the said
191 deponent was examined in pursuance of a commission to me issued in this case.

And I do also certify that the deponent was by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and that the foregoing deposition was then reduced to writing by me and thereafter subscribed by the said deponent in my presence; and I do further certify that I am not of counsel or attorney for either of the parties to the said cause, and that I am not interested in the event of the said cause.

Given under my hand and seal, at the city of Baltimore, within the district of Maryland, this seventeenth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] GEORGE MORRIS BOND,
U. S. Commissioner for Maryland.

192 19TH APRIL, 1882.

JOHN R. KENLY, a witness for complainant, being by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and being examined on behalf of the complainant, makes oath, deposeth, and saith as follows, to wit:

My name is John R. Kenly; I am thirty-five years of age; a resident at present of Richmond, Virginia, and am a civil engineer.

1 Q. Do you know the parties to this cause?

A. I know most of them.

2 Q. Were you in the employment of the complainant; and, if so, for what period?

A. I was in the service of the Union Railroad Company from the 1st of January, 1881, until April 1st, 1882.

3 Q. In what capacity?

A. During the construction of the work I was resident engineer.

4 Q. Did you do any part of the engineering work preliminary to the making up of the specifications for the purposes of the bidding for and the letting of the work for the purposes of the construction of the tunnel?

A. I assisted General Ellicott in getting together the material for the specifications. General Ellicott gave me specifications of the old Baltimore water-works, the Jones falls supply, and of the Baltimore & Ohio railroad, and asked me to select such from these as I thought would be applicable to our railroad and tunnel construction.

193 A great many of the articles he wrote himself; he compiled it. I simply selected what articles I thought would suit and turned them over to him.

5 Q. Did you make report to him of the results of the engineering work done from time to time by you up to May 1st, 1871?

A. I did.

6 Q. During the time the work of construction was going on were you the resident engineer for said tunnel work?

A. I was.

7 Q. Which of the contractors had immediate supervision and charge of the work on the tunnel?

A. Col. Wiley—William M. Wiley.

8 Q. Did you see him frequently?

A. Yes; he was there nearly all the time during the construction of the work; he was absent several times during the progress of the work for some two or three weeks, or perhaps as long as a month.

9 Q. Did you see Mr. James J. Dull during the progress of the work?

A. I did.

10 Q. Did you have any knowledge, or so far as you know did any one else connected with the complainant have knowledge, that any other person than the contractors named in the contract of May 1st, 1871—that is to say, said Dull and Wiley and R. Snowden Andrews—had any interest in said contract or its profits?

A. During the construction of the work I did not, and no one else connected with the complainant had, to my knowledge.

194 11 Q. Please state through whom the complainant first learned that other persons than the contractors named in the last question had an interest in said contract.

(Objected to.)

A. They first learned it through myself, as far as I know.

12 Q. How did you obtain knowledge of the fact?

A. I learned it through the testimony of Mr. James J. Dull, a party to this contract.

13 Q. Where was said testimony given and how did you happen to be present?

A. The testimony was given in Philadelphia—I think in the United States court—and I was present as a witness in the case.

14 Q. Who were the parties to the said case?

A. Milo W. Locke was plaintiff, and the executors (I think) of Col. William M. Wiley.

15 Q. Was it a controversy arising out of the construction of the tunnel?

A. Yes, sir; in this way: Milo W. Clarke was a subcontractor, as I understood it, for the construction of the brick and stone work of the tunnel; he brought suit against the executors of Col. William M. Wiley for certain claims growing out of his subcontract.

16 Q. Please state what you heard Mr. Dull state in his testimony which gave you said knowledge.

A. Mr. Dull testified that a few moments before the death of Col. Wiley—or, rather, a short time before—Colonel Wiley handed him a package of papers and said all the matters relating to the construction of the Union railroad had been settled excepting the tunnel case; that was the substance of his testimony.

195 17 Q. Was this on his examination-in-chief?

A. My recollection is it was.

18 Q. Did he make any further statement on his cross-examination; and, if so, what?

A. Mr. Thomas Lanahan, of this city, was counsel for plaintiff, and asked him if John Ellicott and Mr. Samuel Shoemaker had been paid all of their interest in the work, or words to that effect; my recollection is that he said that they had not; Mr. Lanahan then asked if John Ellicott was paid.

19 Q. When was this trial at which you were present?

A. It was, I think, the latter part of October, 1878.

20 Q. Do you remember the arbitration had between the complainant and Dull?

A. I do; I was present at it.

21 Q. Was the trial of which you speak after the conclusion of said arbitration and the rendition of the award therein?

A. It was after that.

22 Q. What did you do upon your return to Baltimore with reference to communicating the information obtained to the complainant?

A. I immediately saw the former chief engineer, Charles P. Manning, who had by that time ceased to be chief engineer, and told him what I had heard, and asked him to advise me in the matter. (Defendants' counsel object to statements of Mr. Manning.) I said to Mr. Manning if he thought the information would be of any service to the company I would apprise them of it at once.

196 He said that he did not think it would be of any service; that the matter had been settled; I then told him I would not say anything about it for obvious reasons. In thinking the matter over afterwards I concluded to bring it to the notice of the company, which I did by informing Mr. Wrenshall and Mr. Harrison, the president, of what I heard in Philadelphia regarding the matter.

23 Q. At what time did you make the communication to the company?

A. In the latter part of December of the same year; I think it was 1878.

24 Q. In a preceding answer you said that you did not speak of it at first for "obvious reasons;" what reasons did you mean?

(Objected to.)

A. My principal reason was on account of General Ellicott's connections—his friends; I did not wish to have the matter talked about unless it would benefit the company; if I had thought it would I should not have hesitated.

25 Q. Was General Ellicott examined as a witness before the three arbitrators, Messrs. Whitcomb, Martin, and Tyson, in the arbitration before mentioned?

A. He was.

26 Q. Were you present at his examination?

A. I was.

27 Q. By whom was he produced as a witness?

A. By the contractors, Wiley and Andrews.

28 Q. Was he sworn as a witness?

A. I presume he was; but I don't remember that particularly.

29 Q. Upon what was General Ellicott then examined; what testimony did he give?

197 A. He testified in regard to the plan, or plans rather, that was shown the contractors at the letting, and said that the plans by which they were required to build the work were not the ones shown at the letting; that is my recollection of that matter.

30 Q. Had you and Mr. Wrenshall been examined on the same subject, or were you afterwards examined on the same subject?

A. We were examined on the same subject, but I don't know whether before or after he was. I presume I was examined on this subject on behalf of the company.

31 Q. Did Mr. Wrenshall and yourself agree, or did you disagree, with Ellicott's testimony as to said plans?

A. My recollection is that we disagreed with Ellicott.

32 Q. What was your statement about the plans?

A. My recollection is that my statement at that time was that the plans exhibited at the letting were used in the construction of the work.

33 Q. Did General Ellicott state that a plan on a different sheet from that used at the letting was used for the construction?

A. My recollection is that he did.

34 Q. Did anything come out in said examination to give any intimation that he was to get a part of the award himself if any should be made?

A. No, sir.

35 Q. Do you remember whether among the other claims made before the arbitrators by Mr. Dull was one with reference to a lift or allowance of haul in substitution of it?

A. Yes, sir; such claim was made.

198 36 Q. Did such claim amount to any considerable sum?

A. Yes; a very large sum. I don't remember the amount

they claimed.

37 Q. Was Mr. John Ellicott examined on behalf of Mr. Dull in support of such claim last mentioned?

A. My mind is not clear on that point. I think he gave his testimony as an "expert" on that question, but I am not clear on that.

38 Q. Have you any further recollection in regard to any other testimony of said Ellicott before said arbitrators?

A. No, sir; I can't recall any.

Cross-examined:

1 X Q. Who was the chief engineer of the Union Railroad Company at the time you first went into its service, on the 1st of January, 1871?

A. Mr. Charles P. Manning.

2 X Q. Was he present or absent from the city during the time previous to the letting, while the surveys and levelings and other preparatory work was going on?

A. He was absent when I came to Baltimore, January 1st. I was called to Baltimore from Pittsburgh by a joint letter from Mr. Charles P. Manning and John Ellicott. In that letter Mr. Manning said that I should report to General John Ellicott for duty; that he had business in Ohio which required his attention and would not be in the city when I arrived. On my arrival here I reported to General Ellicott, and received nearly all of my letters from him until about the time of the letting.

199 3 X Q. My information from Mr. Wrenshall is that the advertisement for proposals was first published on March 15th, 1871. Had the specifications which you assisted in compiling been prepared before that time?

A. I do not know.

4 X Q. Were printed blanks for proposals specifying the length of sections in feet, the quantity of embankment, and excavation in tunnel and in open cut of tunnel, in cubic yards, the amount of masonry of differerent descriptions required, furnished to the bidders before the day named in the said advertisement for the reception of bids?

A. That I don't know.

5 X Q. Did you never see the proposal blanks furnished to bidders?

A. I presume I did, sir.

6 X Q. The bidders needed to know specifically, did they not, what various kinds and quantities of work were expected of the contractor?

A. It is customary to furnish that information.

7 X Q. Do you remember when it was that Mr. Manning returned to Baltimore?

A. I do not. He was here off and on until about the time of the letting or a short time after. I don't remember positively about that.

8 X Q. You have stated that you were the resident engineer of the Union Railroad Company during the construction of the work

for which Dull, Andrews and Wiley were contractors was going on.

What were the duties of the resident engineer?

200 A. My duty was to superintend the construction of the work. I laid out the work and made the estimates of the amount of work.

9 X Q. Who made the measurements upon which the monthly estimates were based?

A. Myself and my assistants.

10 X Q. Who were your assistants?

A. R. B. Hook, William R. Weaver, George W. Melcher, Robert Small, B. A. Warfield, Robert Foley. I had these assistants at various times. I changed several times during the work.

11 X Q. Please look at estimate No. 1, section No. 1, now produced by Mr. Wrenshall, and say whose are the signatures to that paper.

A. One of them is mine and the other that of Mr. Charles P. Manning.

(It is here agreed that a certified copy of this paper, marked "Monthly Estimate No. 1," shall be made and filed in the place of this original paper.)

12 X Q. In whose handwriting is the manuscript part of the body of said paper?

A. It is mine.

(Excepted to.)

(Exception is here noted by the complainant's solicitor in regard to any estimates.)

13 X Q. That states all the work done by the contractors during the month of May, does it not?

A. As far as I know, it does. I believe it to be my estimate.

14 X Q. Monthly estimates of like character were made by you at the end of every month while the work was going on, were they not?

A. Yes, sir. I think so.

201 15 X Q. Did each estimate after the first include all the preceding work?

A. Yes, sir; we intended it to do so.

16 X Q. Please look at monthly estimate No. 23 and say whether the signature is yours and whether it was made out by you.

A. The signature is mine, and that part indicating the quantities is in my handwriting; the values of the same are in the handwriting of an assistant.

17 X Q. Was the whole estimate made either by you or under your direction?

A. It is approved by me.

18 X Q. Did Mr. Manning take an active part in the general superintendence of the work, as it was done under your direction, under the said construction contracts?

A. He did; he was chief engineer of the road.

19 X Q. Please describe the plan you have spoken of in your

testimony-in-chief, as made for the guidance of the contractors in the work. What did it represent?

A. It represented a brick arch and a section of stone arch; the entrance to the tunnel was of stone.

20 X Q. It was intended, was it not, to show what should be a cross-section of the intended arch?

A. It was intended, as I understood it, to show the general plan of the work.

21 X Q. Please describe more specifically what was exhibited on that general plan, or give a diagram substantially showing what it was.

A. It was a cross-section of the tunnel, indicating a standard
202 for the work, subject, of course, to such modifications as the nature of the ground might require, as is usual in such plans.

22 X Q. It showed the arch of the tunnel, did it not—the invert arch at the bottom and the sustaining or supporting walls at the side?

A. It did, as far as I recollect.

23 X Q. Do you remember the plan, marked "A," which was produced on the part of the Union Railroad Company before the arbitrators and used in evidence before them?

A. I remember that there was a plan produced by the Union Railroad Company in that case.

24 X Q. Do you remember whether there was a date upon that plan?

A. My recollection is there was a date and it was approved, but I may be mistaken.

25 X Q. That plan, A, was the one in accordance with which, with such modifications as the chief engineer might think proper to make, the contractors were required actually to construct the tunnel, was it not?

A. I don't remember the plan by any initials.

26 X Q. Were you present at the examination of Mr. Charles P. Manning on behalf of the company before the arbitrators?

A. I was.

27 X Q. Do you remember that he spoke of a plan, which bore the date of June 22nd, 1871, as made by him before any mason-work was done on the tunnel arch, and prior to the supplemental agreement between the contractors and the Union Railroad Company?

A. I don't remember anything about that; can't recall it.
203 28 X Q. How many courses of brick did the plan upon which the tunnel was constructed exhibit?

A. I don't remember that plan of June 22nd, 1871.

29 X Q. There was a plan, was there not, and you have referred to such, intended for the general guidance of the tunnel; what I wish to know is, your recollection, if you have any, as to the number of rings or courses of brick shown on that plan?

A. The plan that I have reference to was a plan in the office, and I think it was hanging on the wall—and which, I presume, was

shown to the contractors at the letting—which letting, by the way, I had nothing to do with.

30 X Q. Can you state how many rings or courses of brick the plan you refer to showed?

A. My recollection is that it showed six rings of brick in the crown, and I think the same number in the side wall, with a four-brick invert.

31 X Q. Don't you think you are mistaken in that answer?

A. I may be, as it has been several years since I saw the plan, but I don't think I am mistaken.

32 X Q. What did General Ellicott testify with regard to the number of courses in the plan of the tunnel arch, as originally drawn and exhibited before the letting?

A. I don't remember, but do remember that he testified to plans being exhibited that I never saw.

33 X Q. What were the points of difference between the original plan, as supposed in General Ellicott's testimony to have existed as described by him, and the plan of which you have spoken as the one seen by you hanging up in the office.

204 A. My recollection is that in the one spoken of by General Ellicott the stone-backing was a great deal heavier than in the one I recollect hanging in the office; this is one of the points which I recollect. It may have been heavier brick-work also; it was a heavier plan.

34 X Q. Do you recollect the testimony of R. Snowden Andrews before the arbitrators?

A. I recollect that he did testify before them.

35 X Q. Do you recollect that he also testified that he had seen in the office a plan showing more courses of brick or thicker sustaining walls, or both?

A. I don't remember much about his testimony.

36 X Q. A claim was made by the contractors of alleged damage to them in the substitution of a less for a greater number of rings of brick in the arch of the tunnel and in the reduction of the thickness of the sustaining walls, was there not?

A. I believe so.

37 X Q. The evidence with regard to the alleged change of plan related to that claim, did it not?

A. I presume it did.

38 X Q. When did Mr. Ellicott cease to be connected with the Union Railroad Company?

A. I don't know, but it was after the commencement of the construction of the work.

39 X Q. Was it before the completion of it?

A. I understood that it was.

205 40 X Q. Don't you know that it was?

A. I believe it was.

41 X Q. When was the first work done?

A. I think in May, 1871.

J. R. KENLY.

20TH APRIL, 1882.

Cross-examination continued:

42 X Q. When was the first stone-masonry done and the first brick-work on the tunnel?

A. The estimate will show that; that is the only reference or knowledge I have now.

43 X Q. Please look at estimate No. 4, in comparison with the estimate No. 3, and say, if you can, when the first work of those two descriptions on the tunnel section was done? (See monthly estimates Nos. 4 and 5).

A. Judging from the estimate, the first work of the kind you speak of was done in the month of August, 1871. Estimate No. 3 shows no work of that character.

44 X Q. Can you now state when it was that Mr. Ellicott ceased to be connected with the Union Railroad Company?

A. I cannot recollect.

45 X Q. Can you state in what year it was?

A. I cannot.

206 46 X Q. In your examination-in-chief, in answer to the 37th interrogatory, you stated that your mind was not clear on the point in question, referring to the examination of Mr. Ellicott regarding the claim of the contractors before the arbitrators for an increased allowance of haul, adding, "I think he gave his testimony as an expert on that question." If Mr. Ellicott did, according to your recollection, testify as such expert, what was his testimony?

A. I am not certain by any means that he testified on that subject.

47 X Q. Out of what circumstances did the said claim for increased haul arise?

A. From the fact that the material was elevated by machinery.

48 X Q. The contract provided, I believe, for compensation for haul of material contemplating the use of carts, and was to be regulated by distance of carriage, and, by an arrangement made while the work was in progress, machines were introduced by the contractors, by the use of which excavated material was lifted perpendicularly to the margin of the excavation instead of being hauled out circuitously in carts, and the company's engineers made the estimates upon the assumption of a measurement of the actual distance traversed by the vessel in which the material was perpendicularly lifted, and the contractors objected to that and claimed an increase; was not that so?

(Objected to, first, because the question assumes that there was an arrangement made between the contractors and the complainant; and, next, because the subject is not germain to cross-exam-
207 ination, being new matter on which complainant claims the right to cross-examine.)

A. The contract and specifications provided for the removal of the material on the basis of so much for each hundred feet; my

judgment is it did not contemplate that the removal should be by carts or cars, but in such a manner as would expedite the construction of the tunnel; the machinery for elevating the material was placed in operation by the contractors; while there was talk on the part of the contractors in regard to an allowance for the elevation, there was no formal complaint or claim made for said work.

(Objected to as not responsive.)

49 X Q. My object is not at all to go into the merits of the controversy between the contractors and the company or its engineers. In your estimates after the introduction of said machinery you made the allowances of haul by a measurement of the vertical distance traversed by the lift, did you not?

A. I in all cases allowed for haul the actual distance traversed by the material.

50 X Q. In doing that you measured the distance passed by the lifted material as it was perpendicularly hoisted, without taking into account and allowing for the saving effected by dispensing with the use of carts?

A. In accordance with the contract and specifications, I allowed as the haul the distance traversed by the material from the place of excavation to the place of disposal.

51 X Q. In the case of the lifted material, the actual distance, without taking into account the distance a cart would have
208 traversed had not the machine been used; is that so?

A I allowed no additional distance for the elevation of the material.

52 X Q. What was the amount of the machine-lifted material?

A. I don't remember.

53 X Q. Do you remember testifying in regard to it before the arbitrators?

A. Yes, sir; I think I then gave them the amount, but do not recollect it now.

54 X Q. Was it about 120,000 cubic yards?

A. I can't remember; it was a large amount, I know.

55 X Q. What was the whole amount of excavated material in the construction of the tunnel?

A. I do not know, but my "final estimate" will show the amount.

56 X Q. How many hoisting machines were employed by the contractors?

A. I do not remember exactly, but think there were three or four.

57 X Q. When were they first put in use?

A. I can't remember.

58 X Q. Can you remember in what year it was?

A. It was in the first year of the work, I think—1871.

59 X Q. How late in the year?

A. I cannot remember.

60 X Q. A break occurred in the tunnel arch before the completion of the entire work, did it not?

A. Yes, sir.

209 61 X Q. That occurrence excited a great deal of interest, did it not, among those connected in any manner with the tunnel and its construction?

A. Yes, sir.

62 X Q. When did that break occur?

A. It occurred in the spring of 1872, to my recollection—or 1873, was it—I think it was in 1873.

63 X Q. Was Mr. Ellicott at that time in the employ of the company?

A. I don't know, sir; I made no report to him.

64 X Q. There was a question, then, between the contractors and the company's engineers as to the cause of the break, the former attributing it to bad engineering, and the latter to want of proper care on the part of the contractors in construction; am I correct?

A. I believe the contractors claimed that the plan was in fault, but I knew that the break was caused by using frozen material and bad workmanship.

65 X Q. There was a good deal of testimony, *pro* and *con.*, offered before the arbitrators, was there not? And you yourself, amongst others, gave testimony on that point?

A. Yes, sir.

66 X Q. Had some excavation been made for a tunnel prior to the letting of the work, and prior to the year 1871?

A. I think so.

67 X Q. Were the measurements as shown in your monthly estimates carefully and accurately made?

A. They were made as carefully as monthly estimates were usually made; they were intended as approximations of the work done by the month.

210 68 X Q. You had the data requisite for any needed correction or revision of them at the end of the work, had you not?

A. We had the means of getting it, and did so when the work was finally revised and resurveys were made for the final estimates.

(Cross-examination is here concluded, and the complainant now proceeds to examine the witness, claiming that it is a cross-examination upon new matter brought out by the defendant, which claim of the complainant's counsel is not admitted by the defendant.)

1 Q. You have spoken of the final estimate. Do you mean by that "monthly estimate No. 23" or some other?

A. I do not mean "monthly estimate No. 23." I referred to an estimate marked "final estimate," which was sent by me to the chief engineer.

2 Q. You have said that there was some excavation before 1871. Was that done by any of the parties to this proceeding, or was it considerable in quantity?

A. No, sir; there had been very little work done, but by whom I never knew.

3 Q. In one of Mr. Machen's questions he alludes to the controversy whether the break occurred through the defect in the plan; was it not claimed by the contractors also that they were not bound

to make good the break because the contract was silent in regard to any such occurrences during the work?

A. I don't remember that.

211 4 Q. Do you remember whether the contract price for excavation was, in your judgment, formed at the time, a large one?

A. Yes, sir.

5 Q. Looking to the fact that the tunnel was to be constructed in the bed of a public street of the city, and being possessed of information as to the character of the tunnel, *et cetera*, would the contractors not know from the beginning that they would desire to take out materials by lift?

(Objected to.)

A. I should think so.

6 Q. What was the width of Hoffman street under which the tunnel was to be constructed?

A. Sixty-six feet wide, is my recollection.

7 Q. What was the depth of the bottom for the excavation for the tunnel below the grade of the then bed of Hoffman street?

A. I think about sixty feet.

8 Q. Was the claim in regard to the extra allowance for lift based by the contractors upon the language employed in fixing the prices in the contract in regard to haul. In other words, upon the language "haul for all material excavated for each hundred feet hauled, per cubic yard, 1¼ cents?"

A. That is the only thing said about haul in the contract.

9 Q. Did they claim, nothing else being said, that they were entitled under that language to an allowance for more than the actual distance the material was moved, because if it had been hauled in the ordinary way it would have been carried a greater distance?

A. Yes, sir; that was the way they argued.

212 10 Q. Did they produce some evidence before the arbitrators to show that similar allowances had sometimes been made?

A. They did.

11 Q. Did you consider the price paid for excavation sufficient to compensate for it fully, with the moving of the material paid for, in the way in which you estimated?

(Objected to.)

A. Yes, sir; I did.

Examined by Mr. MACHEN on behalf of the defendant:

69 X Q. Do you know how long prior to your own engagement it was that Mr. Charles P. Manning was employed by the Union Railroad Company as its chief engineer?

A. I do not.

70 X Q. Was Mr. Manning an engineer of eminence and experience?

A. I always considered him as such.

71 X Q. Was he, like yourself, produced as a witness by the Union Railroad Company before the arbitrators and examined at length?

A. He was.

72 X Q. Do you remember how long the trial before the arbitrators lasted?

A. I do not; but for several weeks, I know.

J. R. KENLY.

213 I, George Morris Bond, a commissioner as aforesaid, do also certify that the reason for taking the foregoing deposition of —— —— was and is, and the fact was and is, that the said deponent, John R. Kenly, was examined in pursuance of a commission to me in this case issued.

And I do also certify that the deponent was by me first examined and cautioned and fully sworn according to law to testify the whole truth, and that the foregoing deposition was then reduced to writing by me and thereafter subscribed by the said deponent in my presence; and I do further certify that I am not of counsel or attorney for either of the parties to the said cause, and that I am not interested in the event of the said cause.

Given under my hand and seal, at the city of Baltimore, within the district of Maryland, this twentieth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] GEORGE MORRIS BOND,
U. S. Commissioner for Maryland.

214 8TH DECEMBER, 1883.

R. SNOWDEN ANDREWS, a witness for complainant, being by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and being examined on behalf of the complainant, makes oath, deposeth, and saith as follows, to wit:

My name is R. Snowden Andrews; I reside in Baltimore city, and am a civil engineer, and at present engaged as a stock broker in the city of Baltimore.

1 Q. Were you not a bidder for the construction of the Union railway tunnel, and subsequently one of the contractors for the construction of that work?

A. I was.

2 Q. Was the bid or proposal which you made upon said work your individual bid, or did you bid in conjunction with any other person or persons?

A. My bid was made in connection with other persons.

3 Q. In their name as well as your own or in your own name solely, to the best of your recollection?

A. As well as I remember at this date, the bid was in the name of R. Snowden Andrews & Co. or Andrews & Co.

4 Q. Was your bid accepted; if not, to whom was said contract awarded?

A. My bid was not accepted; the contract was awarded to Dull, Wiley & Andrews, after an arrangement had been made.

5 Q. By Dull & Wiley you mean James J. Dull and Colonel William M. Wiley, do you not?

A. I do.

215 6 Q. Please state what was the arrangement in pursuance of which said contract was awarded, as you have stated, to said Dull and Wiley and yourself—I mean the arrangement between Messrs. Dull, Wiley, and yourself, with all the circumstances leading thereto.

A. It was when the bids were opened and read; among the bids was one by Messrs. Dull & Wiley and one by myself and certain associates. Wiley and myself, who met an hour or two after the opening of the bids, were introduced to each other and conversed upon the character of these two bids, which we saw were very near together, and that it would be impossible to decide which was the lowest bid, as they were in great detail and the quantities would have to be applied to them, which quantities had not been furnished to any of the bidders and would require several days to ascertain so as to determine which would be the lowest bid, but that these two bids at a glance could be seen were lower than other bids.

In this conversation, when he learned that I was the son of a gentleman who had been his friend and assisted him in the early part of the war, the suggestion was made that we should go together, but this suggestion was subject to the approval of his friend and co-bidder, Dull, who was not present in the city of Baltimore. He undertook to sound Dull on this subject and submit to me the result as to how Dull felt about it.

After one or possibly two days had elapsed I wired him
216 and suggested that he and Dull should come to Baltimore; he (Wiley) came down, bringing authority from Dull (which was verbal) to do anything in the matter he (Wiley) thought best. I then said to him, after he was willing to carry out this suggestion, "Now, the first thing for us to do in order that Mr. Harrison, president of the company, may see that we are dealing with him squarely would be for us to go together to Mr. Harrison and inform him that we propose to associate ourselves together, so that if the award should be made on the Dull & Wiley bid I would be associated with them, and and if the award was made on the Andrews bid, Dull and Wiley would be associated with me. Mr. Harrison was very much pleased and very warm in his expression of pleasure, stating to us that they had not yet been able to reach a conclusion, but as far as they had gone it looked as though one of these bids would be the successful one; that he knew all about Mr. Wiley, and that some of the gentlemen associated with him were very favorably impressed with him, he having just finished a very large contract for the Northern Central R. Road Company, while he, Mr. Harrison, knew all about me as a Marylander, and he would like to see a Marylander connected with the work, and that this proposed association of Dull, Wiley and Andrews would be very acceptable to him if either of these bids

were accepted, and that he was glad that we had come to such a determination and notified him thereof.

After some days it was determined to award the contract
217 to the Dull & Wiley bid as being the lowest bid, and we went to work to formally confirm what we had agreed to do verbally. We drew up articles of partnership, the substance of which was that Dull & Wiley were to be interested in the contract to the extent of one-third each, and to furnish one-third each of the necessary plant, which we estimated would cost fifty thousand dollars; that I (Andrews) was to be interested to the extent of one-sixth interest, and that I should furnish one-sixth of the $50,000; that a provision should be made in writing to nominate some one to represent any one of us who should die during the duration of the contract.

(Objection is here noted as to testimony being given as to the contract between Dull, Wiley & Andrews, it appearing that said agreement was in writing.)

I designated Thomas S. Rhett, my friend, to represent me in the event of my death, and I do not remember the names of the two persons designated by Dull & Wiley. One other provision was introduced that Wiley should give his entire personal attention to the work, and that neither Dull nor myself were obligated to give other than a general supervision to the work, and that Wiley was to receive a personal consideration over and above his interest in any profits which might be made, at the rate of $5,000 a year.

7 Q. When the agreement was first made between Col. Wiley, Dull, and yourself that in the event of the success of either of your bids you should be jointly associated in the prosecution of the work, was there any understanding as to what your respective in-
218 terests or shares in the contract should be; and, if so, what was that understanding?

A. In our verbal understanding, in conversation prior to this written agreement, nothing was said as to our respective interests in precise terms. I assumed that we would all be on the same footing—I mean by that, I would have a one-third interest if Dull & Wiley were successful, and they would have a two-third interest if I was successful.

8 Q. When you subsequently and upon the award of the contract came to reduce your previous verbal understanding to writing, your interest in the contract, I understand, was limited to one-sixth instead of one-third. Can you explain how this happened to be the case?

(Objected to.)

A. When we came to draw up articles of agreement I was informed by Mr. Wiley that prior (Wiley's statements here objected to) to any conversation with me on the subject of being associated together that he had certain conversations and talk of associations with him and Dull and another party, who now claimed of him to be associated, and that he should be allowed an interest in this con-

tract. I objected to any such programme, but was obliged to yield, and either take a sixth interest, furnishing the money for a sixth of the plant, or else make a row right in the beginning with my associates; so I consented to unite, taking a one-sixth interest.

9 Q. Was the name of this other party, who claimed an interest in the contract, mentioned, or was any statement made or understanding reached as to what interest or share said party was to have?

219 A. His name was mentioned and I was given to understand that he was to have a one-sixth interest and furnish one-sixth of the money for the plant.

10 Q. What was the name of the party so referred to?

(Objected to.)

A. Mr. Samuel Shoemaker.

11 Q. You have stated that your final agreement with Messrs. Dull & Wiley was in writing; was there more than one copy of said written agreement made and signed by Messrs. Dull, Wiley, and yourself, as well as you can remember?

A. I only remember one copy which was in my possession, but there may have been others.

12 Q. State what has become of said copy; and, if it was a copy state what has become of the original.

A. It was the original paper, as far as I can remember. I have no knowledge what has become of it in the lapse of years. It remained in my possession for many years after the completion of the work, but I have not seen it for several years. During my connection with the contract I lodged it in the care of Col. Thomas S. Rhett in case I should die, *and* as he was the person I had designated to represent me in case I should die. After my pecuniary interest in the contract ceased he returned it to me, but I don't know what has become of it since; whether it was destroyed as a useless paper or what has become of it.

13 Q. State if you know whether Col. Wiley or Dull retained duplicates of said agreement or whether said agreement was executed in duplicate or triplicate?

A. I cannot say at this date.

220 14 Q. Did you retain your interest in the contract until the completion of the work; if not, when did your interest cease?

A. As well as I can state, my interest ceased some six or eight months before the completion of the work, or before the time it was expected to be completed—in the summer or fall prior to the completion of the work.

15 Q. How and to whom did you dispose of your interest in the contract?

A. By sale to Mr. Dull, through Mr. Wiley.

16 Q. Had you any knowledge, at any time during your connection with the work, that any other person besides Messrs. Dull, Wiley, Shoemaker, and yourself had an interest in or was entitled to share in the profits of said contract?

A. I had no knowledge that any one was entitled to any interest in the contract. Several weeks, or possibly several months, before I sold out, and after his connection as engineer with the work, I had reason to believe that John Ellicott had some kind of an understanding with Mr. Shoemaker, the nature of which, however, I never knew.

17 Q. In speaking of the final distribution made of the several interests of Messrs. Dull, Wiley, and yourself in the contract, I understood you to say that Messrs. Dull & Wiley were each to have one-third, and to contribute one-third of the capital, estimated at fifty thousand dollars, and that you were to have an interest of one-sixth and contribute one-sixth of the capital. What provision was made for the distribution of the remaining one-sixth?

(Objected to.)

221 A. As well as I remember, Mr. Shoemaker was to contribute one-sixth of the capital required for the plant, which I believe he did.

Cross-examined:

1 X Q. Who was present at the signing of the agreement or articles of partnership referred to in your testimony-in-chief?

A. I remember no one positively but Wiley and myself.

2 X Q. When did Mr. Dull sign them?

A. As far as I can remember, Wiley signed for himself and for Dull—Dull's name per Wiley.

3 X Q. Was Mr. Shoemaker a party to the instrument?

A. He was not; and I never had any conversation with Mr. Shoemaker in connection with the tunnel contract until several years after the completion of the work.

4 X Q. Then, if I understand you correctly, Mr. Shoemaker's name was not mentioned in the written instrument?

A. It was not; the instrument was defining my interest more particularly.

5 X Q. When was this final agreement as to division of interest and the signing of the writing done and made?

A. Some few days after the award of the contract—possibly a week or ten days.

6 X Q. May not the interval have been somewhat longer than that?

A. It may have been; my business required my continual presence in Richmond, where I was personally living at the time, and so constantly occupied as only to be able to visit Baltimore about once in every three or four weeks, when I could get time from my other daily occupations.

222 7 X Q. Was the work under the contract of Dull, Wiley & Andrews with the Union Railroad Company performed well and properly and in accordance with the contract during the time you were interested in the matter?

(Objected to as not responsive to any part of the examination-in-chief.)

A. It was well and faithfully performed.

The further examination of this witness was then adjourned to the 13th day of December, and the same year, to the same place, at 3 o'clock in the afternoon, at which time and place the commission met pursuant to adjournment, and I proceeded in the presence —

13TH DECEMBER.

8 X Q. Did you have an opportunity after you ceased to be pecuniarily interested in said construction contract of observing how the work was performed, and if you had what was the character of such work?

(Objected to.)

A. I did; on my trips home here to visit my family I rarely failed to visit the work, and found it was being carried out in a most thorough and workmanlike manner.

9 X Q. Do you know whether the said work has been accepted and made use of by the Union Railroad Company?

(Objected to as irrelevant and not responsive to the examination-in-chief.)

A. It has been accepted and made use of by the Union Railroad Co., and since then been sold to the Pennsylvania Railroad Company.

223 10 X Q. In your answer to the 2nd interrogatory-in-chief you said that your bid was made in connection with other persons. Are any of those persons party or parties to this suit?

A. They are not, in any manner, shape, or form.

Re-examined:

18 Q. In answer to the 4th cross-question you have stated that the written instrument which was drawn up at the time of the final distribution or division of interests in the contract was more particularly an instrument defining your interest in the contract. Is that the same paper which you have previously referred to as having been deposited by you with your friend Col. Thomas S. Rhett, and which, after the termination of your own pecuniary interest in the contract, was returned by Col. Rhett to you?

A. It is the same.

19 Q. Was it the only written instrument relating to your interest in the contract which was executed by your association and yourself?

A. It is; of course we signed the construction contract with the Union railroad.

20 Q. Have you ever made any search among your papers to see whether or not you could find said paper?

A. I never have.

21 Q. Will you be kind enough to make such examinatien, and if found file said paper with the commissioner?

A. If I find it I will file it with the commissioner, but if it
224 had been among my papers I would have probably seen it, and as it was handed back to me by Col. Rhett some time after it had ceased to be of value to me it was probably then destroyed by me.

23 Q. When did your make your contribution of capital to the firm of contractors of which you were a member, and what was the amount?

A. The amount was one-sixth of $50,000, or $8,333,33, and it was made, I suppose, about a week or ten days after entering into the contract; I don't remember the exact day, but as soon as it was called for by Wiley.

Recross-examined:

11 X Q. Do you mean by "contract," in your answer to the last question-in-chief, the written agreement between Dull & Wiley, represented by Wiley and yourself, defining your interest in the work?

A. I do.

R. SNOWDEN ANDREWS.

STATE OF MARYLAND, *City of Baltimore*, } *ss:*

In pursuance of a further order of court passed in this cause on the 27th day of December, 1883, I, George Morris Bond, after due notice of time and place given to the solicitors of the respective parties, met at the office of R. Snowden Andrews, No. 6 South street, in this city, and proceeded to take his answer under oath to the following interrogatory—that is to say:

225 Question. Have you since your last examination in this case made any search for the agreement mentioned by you in your testimony then given?

Answer. Since my examination I have made a careful and diligent search for the agreement between myself and Messrs. Dull & Wiley, to which I referred in my testimony, but could not find it, and I believe that it has been destroyed.

R. SNOWDEN ANDREWS.

Given under my hand and seal, at the city of Baltimore, within the district of Maryland, this second day of January, 1883.

{Seal of Commissioner Circuit Court for the District of Maryland, United States.}

GEORGE MORRIS BOND,

United States Commissioner, Circuit Court for the District of Maryland.

226 *Complainant's Exhibits.*

EXHIBITS J. C. W., No. 1.

Duplicate.

Pay-roll, Engineering Department, for January, 1871, Union Railroad.

We, the undersigned, hereby acknowledge to have received from the Union Railroad Co., by the hands of John Ellicott, engineer in charge, the sums of money set opposite our names, respectively, in full payment for services rendered by us during the month of January, 1871, of said road.

Nature of employment.	Duration of service.	Rate of pay.	Amount.	Signature.
		Pr. mo.		
Office ass't	One month	125		John Laing.
Resident eng'r	"	125	$125	Jno. R. Kenly.
Draughtsman	"	90	125	John E. Laing.
Rodman	"	75	90	Wm. R. Weaver.
Chainman	"	60	75	Rob't H. Small.
"	"	50	60	Geo. P. Melcher.
		Pr. day.		
Poleman	16 days	2	50	H. D. Webster.
Pegman	1 "	2	32	J. Bond.
			2	
Total			$559	

I certify that the above is correct.

JOHN ELLICOTT,
Engineer in Charge.

Examined and approved by—

——.

——, 1871.

227 No. 2.

Pay-roll, Engineering Department, for February, 1871, Union Railroad.

We, the undersigned, hereby acknowledge to have received from the Union Railroad Co., by the hands of John Ellicott, engineer in charge, the sums of money set opposite our names, respectively, in full payment for services rendered by us during the month of February, 1871, of said road.

Nature of employment.	Duration of service.	Rate of pay.	Amount.	Signature.
Office ass't	One month	125	$125	John Laing.
Resident engineer	"	125	125	Jno. R. Kenly.
Draughtsman	6 days	350	21	J. E. Laing, per J. Laing.
Rodman	One month	75	75	Wm. R. Weaver.
Chainman	"	60	60	Rob't H. Small.
Chainman	"	50	50	Geo. M. Melcher.
Total			$456	

I certify that the above is correct.

JOHN ELLICOTT,
Associate Engineer.

Examined and approved by—

——, 1871. —— ——.

228 No. 3.

Pay-roll, Engineering Department, for March, 1871, Union Railroad.

We, the undersigned, hereby acknowledge to have received from the Union Railroad Company, by the hands of John Ellicott, engineer in charge, the sums of moneys et opposite our names, respectively, in full for services rendered by us during the month of March, 1871, of said road.

Nature of employment.	Duration of service.	Rate of pay.	Amount.	Signature.
Office ass't	One month	125	$125	John Laing.
Resident engineer	"	125	125	Jno. R. Kenly.
Rodman	"	75	75	Wm. R. Weaver.
Chainman	"	60	60	Rob't H. Small.
Chainman	"	50	50	Geo. W. Melcher.
Total			$435	

MARCH, 1871.

I certify that the above is correct.

JOHN ELLICOTT,
Associate Engineer.

Examined and approved by— —— ——.

229 *Engineer's Pay-roll Account.*

ENGINEERING DEPARTMENT, *March* 31*st*, 1871.

No. —. Union Railroad Co. to J. C. Wrenshall, Dr.

1871. For services as ass't engineer during month of March, 1871, 27 days, at $10, temporarily employed ---------- $270 00

Received of Union Railroad Company, by hands of John Ellicott, associate engineer, two hundred and seventy dollars, in full of the above account.

$270.00. J. C. WRENSHALL.

Correct. JOHN ELLICOTT,
Associate Engineer.

230 No. 4.

Account.

ENGINEERING DEPARTMENT, *April* 29, 1871.

No. —. Union Railroad Co. to J. C. Wrenshall, Dr.

187–. For services as assistant engineer during month of April, 1871, 25 days, at $10 per day---------- $250 00

ENGINEER'S OFFICE, UNION RAILROAD, *May* 1, 1871.

Received of Union Railroad Company, by hands of —— ——, two hundred and fifty dollars, in full of the above account.

$250.00. J. C. WRENSHALL.

Correct. JOHN ELLICOTT,
Associate Engineer.

231 No. 5.

Pay-roll, Engineering Department, for April, 1871, Union Railroad.

We, the undersigned, hereby acknowledge to have received from the Union Railroad Co., by the hands of John Ellicott, engineer in charge, the sums of money set opposite our names, respectively, in full payment for services rendered by us during the month of April, 1871, of said road.

Nature of employment.	Duration of service.	Rate of pay.	Amount.	Signature.
Office ass't	One month	125	$125	John Laing.
Res'd't engineer	"	125	125	Jno. R. Kenly.
Rodman	"	75	75	Wm. R. Weaver.
Chainman	"	60	60	Rob't H. Small.
Chainman	"	50	50	Geo. W. Melcher.
Total			$435	

ENGINEER'S OFFICE, UNION RAILROAD, *May* 1, 1871.

I certify that the above is correct.

JOHN ELLICOTT,
Associate Engineer.

Examined and approved by—

——.

——, 187–.

232 No. 6.

Pay-roll, Engineering Department, for May, 1871, Union Railroad.

We, the undersigned, hereby acknowledge to have received from the Union Railroad Co., by the hands of John Ellicott, associate engineer, the sums of money set opposite our names, respectively, in full payment for services rendered by us during the month of May, 1871, of said road.

Nature of employment.	Duration of service.	Rate of pay.	Amount.	Signature.
Office ass't	One month	125	$125	J. Laing.
Res'd't engineer	"	125	125	Jno. R. Kenly.
Rodman	"	75	75	Wm. R. Weaver.
Chainman	"	60	60	Rob't H. Small.
Chainman	"	50	50	Geo. W. Melcher.
Poleman	"	25	25	W. J. Cumming.
Total			$460	

ENGINEER'S OFFICE, UNION RAILROAD, *June* 2, 1871.

I certify that the above is correct.

JOHN ELLICOTT.
Associate Engineer.

Examined and approved by—

——.

——, 187–.

233 No. 7.

Pay-roll, Engineering Department, for June, 1871, Union Railroad.

We, the undersigned, hereby acknowledge to have received from the Union Railroad Co., by the hands of John Ellicott, associate engineer, the sums of money set opposite our names, respectively, in full payment for services rendered by us during the month of June, 1871, of said road.

Nature of employment.	Duration of service.	Rate of pay.	Amount.	Signature.
Office ass't	One month	125	$125	John Laing.
Res'd't engineer	"	125	125	Jno. R. Kenly.
Rodman	"	75	75	J. R. Kenly for Wm. R. Weaver.
Chainman	"	60	60	Rob't H. Small.
Chainman	"	50	50	Geo. W. Melcher.
Total			$435	

I certify that the above is correct.

JOHN ELLICOTT,
Associate Engineer.

Examined and approved by—

WM. G. HARRISON,
Committee on Road.
WM. I. RASIN,
Committee on Finance.

——, 187–.

234 *Construction. Real Estate Account.*

ENGINEERING DEPARTMENT,
BALTIMORE, *July 28th*, 1871.

No. —. Union Railroad Co. to Charles Dunn, Dr.

1871.		
July 28th.	For 191½ days' labor, at $2	$383 00
	" 81 " carpenter's work, at $3.50	283 50
	" hauling 8 loads posts, at $2.50 per load (4-horse team)	20 00
	" 6 loads hauling lumber, rails, and tools, at $1.50	9 00
		$695 50

Received of Union Railroad Company, by hands of John Ellicott, associate engineer, six hundred and ninety-five dollars, in full of the above account.

$695.50.

CHARLES DUNN.

ENGINEER'S OFFICE, UNION RAILROD, *Aug.* 6, 1871.

Correct.
Aug. 4th, 1871.

JOHN ELLICOTT,
Associate Engineer.

235 No. 8.

Union Railroad Company, per order of Gen'l Ellicott, to Burns & Sloan, Dr.

1871.

June 29.	To	117 ft. 3x6 W. P., 18 ft., 4½		4 82	
	"	60 " 3x12 Y. P., 20 ft., 4c		2 40	
	"	44 " 4x8 16 " "		1 76	
	"	1,444 " 4–4 hemlock rails, 2½		36 10	
		Hauling		4	
					49 08
July 6.	"	800 " 4–4 hemlock rails, 2½		20	
		Hauling		2	
					22
7.	"	1,600 " " " " 2½		40	
		Hauling		4	
					44
8.	"	3,211 " " " " 2½		80 28	
	"	71 " " culls "		1 78	
		Hauling		8	
					90 06
10.	"	50 chestnut posts, 40 cts.		20	
	"	1,600 ft. 4–4 hemlock rails, 2½		40	
		Hauling		8	
					68
	"	moving 1 load			1 00
12.	"	144 chestnut posts, 40 cts.		57 60	
	"	1,600 ft. 4–4 hemlock rails, 2½		40	
		Hauling		16	
					113 60
17.	"	21 chestnut posts, 40 cts.		8 40	
	"	800 ft. 4–4 hemlock rails, 2½		20	
		Hauling		4	
					32 40
20.	"	720 ft. 4–4 hemlock rails, 2½		18	
		Hauling		2	
					20
21.	"	75 chestnut posts, 40 cts.		30	
	"	1,688 ft. hemlock rails, 2½		42 20	
		Hauling		10	
					82 20

236

July 24th.	To	242 chestnut posts, 40c.		96 80	
	"	3,200 ft. 4–4 hemlock rails, 2½		80	
	"	28 " 4x6 W. P. for gate, "		98	
		Hauling		28	
					205 78
					$728 12

CR.

" " By 25 chestnut posts returned, 40c. ---------- 10

$718 12

Aug. 8th, 1871.
Received payment, BURNS & SLOAN.

Correct.
Aug. 4th, 1871. JOHN ELLICOTT,
Associate Engineer.

No. 9.

Received, Baltimore, February 28th, 1871, of the Union Railroad Company, by its treasurer, the sum of eight hundred and thirty-three dollars and thirty-three cents, the same being in full for salaries, as chief and associate engineers to date, inclusive, at the rate of five thousand dollars per annum, jointly.

CHAS. P. MANNING,
Chief Engineer.
JOHN ELLICOTT,
Associate Engineer.

237 No. 10.

ENGINEER'S OFFICE,
UNION RAILROAD COMPANY, 15 SOUTH ST.,
BALTIMORE, *March 31st*, 1871.

Received of the Union Railroad Company, by the hands of its treasurer, the sum of four hundred and sixteen dollars and sixty-six cents ($416.66), the same being in full for salaries of chief and associate engineers to date, inclusive, at the rate of five thousand dollars per annum, jointly.

CHAS. P. MANNING,
Chief Engineer.
JOHN ELLICOTT,
Associate Engineer.

No. 11.

ENGINEER'S OFFICE,
UNION RAILROAD COMPANY, No. 15 SOUTH ST.,
BALTIMORE, *April 30th*, 1871.

Received of the Union Railroad Company, by the hands of its treasurer, the sum of four hundred and sixteen dollars and sixty-six cents ($416.66), the same being in full for salaries of the chief and associate engineers to date, inclusive, at the rate of five thousand dollars per annum, jointly.

CHAS. P. MANNING,
Chief Engineer.
JOHN ELLICOTT,
Associate Engineer.

238 No. 12.

ENGINEER'S OFFICE,
UNION RAILROAD COMPANY, 15 SOUTH ST.,
BALTIMORE, *May* 31*st*, 1871.

Received of the Union Railroad Company, by the hands of its treasurer, the sum of four hundred and sixteen dollars and sixty-six cents ($416.66), the same being in full for salaries of chief and associate engineers to date, inclusive, at the rate of five thousand dollars per annum, jointly.

CHAS. P. MANNING,
Chief Engineer.
JOHN ELLICOTT,
Associate Engineer.

No. 13.

Received, Baltimore, July 3rd, 1871, of the Union Railroad Company, by its treasurer, the sum of four hundred and sixteen dollars and sixty-seven cents ($416.67), the same being in full for salaries of chief and associate engineers up to the 30th of June, 1871, inclusive, at the rate of five thousand dollars per annum, jointly.

CHAS. P. MANNING,
Chief Engineer.
JOHN ELLICOTT,
Associate Engineer.

239 No. 13½.

ENGINEER'S OFFICE,
UNION RAILROAD COMPANY, 15 SOUTH ST.,
BALTIMORE, *July* 31*st*, 1871.

Received of the Union Railroad Company, by the hands of its treasurer, the sum of four hundred and sixteen dollars and sixty-six cents ($416.66), in full for salaries of chief and associate engineers to date, inclusive, being at the rate of five thousand dollars per annum, jointly.

CHAS. P. MANNING,
Chief Engineer.
JOHN ELLICOTT,
Associate Engineer.

No. 14.

UNION RAILROAD COMPANY.
No. 143. BALTIMORE, *Aug.* 1*st*, 1871.

Franklin bank pay to the order of John Ellicott four hundred and sixty-four dollars and twenty-five cents, $464.25.

WM. G. HARRISON, *President.*
—— ——, *Secretary.*

(Endorsed:) John Ellicott.

240 No. 15.

OFFICE U. R. R. Co., *Nov.* 17, 1870.

DEAR SIR: Messrs. John Henderson & Co. have lodged complaint with me that the tunnel running under the rope-walk owned by them is again falling in, and threaten to put a stop to their work. Will you have the goodness to look into this matter and take such measures as to you seem proper to arrest the injury threatened.

Very truly, WM. G. HARRISON, *President.*

To Mr. John Ellicott, assistant engineer U. R. R. Co.

No. 16.

BALTIMORE, *April 24th*, 1873.

The Union Railroad Co. to Thos. Coffay, Dr.

1872.
July 19. To open carriage, 6¾ hours, with architect (Mr. John Ellicott)---------- $10 00

Received payment,

THOMAS COFFAY.

241 No. 17.

UNION RAILROAD COMPANY,

No. 165. BALTIMORE, *January 22nd*, 1874.

Franklin Bank, pay to the order of John Ellicott ten dollars, $10.00.
$10.00.

WM. G. HARRISON, *President.*

(Endorsed:) John Ellicott.

No. 18.

John Ellicott, architect and engineer, 116 St. Paul St.

BALTIMORE, *Jan 6th*, 1874.

Mr. Wm. G. Harrison, pres't Union Railroad Co.

MY DEAR SIR: In looking over my papers I found the enclosed bill against the Union R. R. Co. for hack hire. The item was originally charged by Coffay to me individually, but was subsequently charged, as the service was performed, for the company. I paid the bill, however, and am, therefore, entitled to be re-embursed.

With kind regards and much respect, I am very truly yours,

JOHN ELLICOTT.

242 No. 19.

Account.

ENGINEERING DEPARTMENT, *September*, 1871.

No. —. Union Railroad Co. to Charles P. Manning, Dr.

1871.

Sept. 30. For services as chief engineer from the 1st inst. to date, one month, at $5,000 per annum $416 66

Received of Union Railroad Company, by hands of the treasurer, four hundred and sixteen dollars and sixty-six cents, in full of the above account.

$416.66. CHAS. P. MANNING.

243 No. 20.

Account.

ENGINEERING DEPARTMENT, *August 31st*, 1871.

No. —. Union Railroad Co. to Charles P. Manning, Dr.

1871. For services as chief engineer (including pay of his associate) for the month of August, 1871, at the fixed salary of $5,000 per annum, one month $416 66

Received of Union Railroad Company, by hands of their treasurer, four hundred and sixteen dollars and sixty-six cents, in full of the above account.

$416.66. CHAS. P. MANNING.

244 Section No. 1. Estimate No. 1.

Monthly Estimates for May, 1871.

Engineering Department, Union Railroad.

I certify that the following is a correct estimate of the quantity, character, and value of work done by Dull, Wiley & Andrews, contractor-, up to the 31 of May, 1871, in accordance with their articles of agreement with the Union Railroad Company for the graduation, masonry, and ballasting of section No. 1 of said road, and that the deductions therefrom are true statements of the value of work executed by them during the month of May, 1871, and the amount due therefor, as stipulated in said agreement :

Quantity.	Character.	Value.
		Dollars. Cts.
438 cubic yards	Earth excavation, at 30 cents	131 40
00 "	Loose rock excavation, at 60 cents	00 00
22 "	Solid rock excavation, at 1.50	33 00
	Tunnel heading excavation	
	Tunnel bottoming excavation	
235 "	Tunnel shafting excavation, at $8.00	1,880 00
8,617 "	Tunnel, open cut, excavation, at 60 cents	5,170 20
9,312 "	Hauled 958 feet (embankment) @ 1¼ cts., at 12 cents	1,117 44
	Packing over tunnel arch, &c., at 1 cent	
	Brick-work in tunnel and shafts	
	Stone masonry, " "	
	Retaining-wall masonry	
	French drain	
	Rectangular culvert masonry	
	Arched " "	
	First-class bridge "	
	Second-class " "	
	Ballast " "	
	Clearing and grubbing	
237 c. yds.	Brick delivered, $6.00	1,422 00
60 "	Stone " 4.00	240 00
	Total	$9,994 04
	Total of previous estimate	00 00
	Value of work done in May	$9,994 04
	Amount retained	1,998 80
	Amount due	$7,995 24

JNO. R. KENLY,
Res't Engineer.

The above estimate and the deductions therefrom have been examined and are approved by me.

——— ———,
Chief Engineer

— hereby acknowledge to have received from the Union Railroad Company the sum of — in payment of the amount estimated to be due on the above account.

———, 187–. ——— ———, *Contractor.*

[Endorsed:] Section No. 1. Estimate No. 1. Union railroad. Monthly estimate for May, 1871. Amount paid, $7,995.24. Dull, Wiley & Andrews, contractors. Force on 31 May, 1871, 100 men, 53 horses.

245 Section No. 1. Estimate No. 3.

Monthly Estimate for July, 1871.

Engineering Department, Union Railroad.

I certify that the following is a correct estimate of the quantity, character, and value of work done by Dull, Wiley & Andrews, contractors, up to the 31 of July, 1871, in accordance with their articles of agreement with the Union Railroad Company for the graduation, masonry, and ballasting of section No. 1 of said road, and that the deductions therefrom are true statements of the value of work executed by them during the month of July, 1871, and the amount due therefor, as stipulated in said agreement:

Quantity.	Character.	Value.
		Dollars. Cts.
3,274 cubic yards	Earth excavation, at 30 cents	982 20
	Loose rock excavation	00 00
1,538 "	Solid rock excavation, at 1.50	2,307 00
	Tunnel heading excavation	
	Tunnel bottoming excavation	
639 "	Tunnel shafting excavation, at 8.00	5,112 00
37,000 "	Tunnel, open cut excavation, at 75 cents	27,750 00
42,451 "	Hauled 1,600 feet (embankment), 1¼, at 20 cents	8,490 20
	Packing over tunnel arch, &c.	
	Brick-work in tunnel and shafts	
	Stone masonry, tunnel and shafts	
480 "	Retaining-wall masonry, at 9.00	4,320 00
	French drain	
	Rectangular culvert masonry	
	Arched " "	
	First-class bridge "	
	Second " " "	
	Ballast	
	Clearing and grubbing	
1,400 c. yds	Stone delivered, $4.00	5,600 00
1,000 "	Brick " 6.00	6,000 00
	Total	$60,561 40
	Total of previous estimate	35,052 25
	Value of work done in July	$25,509 15
	Amount retained	5,101 83
	Amount due	$20,407 32

JNO. R. KENLY,
Res't. Engineer.

The above estimate and the deductions therefrom have been examined and are approved by me.

——— ———,
Chief Engineer.

— hereby acknowledge to have received from the Union Railroad Company the sum of —, in payment of the amount estimated to be due on the above account.

——, 187–. —— ——, *Contractor.*

[Endorsed:] Section No. 1. Estimate No. 3. Union railroad. Monthly estimate for July, 1871. Amount paid, $20,407.32. Dull, Wiley & Andrews, contractors. Force on 31 July, 1871, 200 men, 85 horses.

246 Section No. 1. Estimate No. 4.

Monthly Estimate for August, 1871.

Engineering Department, Union Railroad.

I certify that the following is a correct estimate of the quantity, character, and value of work done by Dull, Wiley & Andrews, contractors, up to the 31 of August, 1871, in accordance with their articles of agreement with the Union Railroad Company for the graduation, masonry, and ballasting of section No. 1 of said road, and that the deductions therefrom are true statements of the value of work executed by them during the month of August, 1871, and the amount due therefore, as stipulated in said agreement:

Quantity.	Character.	Value.
		Dollars. Cts.
5,718 cubic yards	Earth excavation, at 30 cents	1,715 40
	Loose rock excavation	
3,048 "	Solid rock excavation, at 1.50	4,572 00
	Tunnel heading excavation	
	Tunnel bottoming excavation	
639 "	Tunnel shafting excavation, at 8.00	5,112 00
55,251 "	Tunnel, open cut excavation, at 75 cents	41,438 25
64,656 "	Hauled 2,000 feet (embankment), 1¼c., at 25 cents	16,164 00
25 "	Packing over tunnel arch, &c., at 1.25	31 25
228 "	Brick-work in tunnel and shafts, at 9.50	2,166 00
585 "	Stone masonry, tunnel and shafts, at 9.00	5,265 00
1,462 "	Retaining-wall masonry, at 9.00	13,158 00
66 "	Skew-backs, at $20.00	1,320 00
80 "	Rectangular culvert masonry, at 6.00	480 00
64 "	Arched " " at 9.00	576 00
	First-class bridge "	
	Second " " "	
	Ballast " "	
	Clearing and grubbing	
1,600 c. yds.	Stone delivered, 4.00	6,400 00
1,400 "	Brick " 6.00	8,400 00
	Total	$106,797 90
	Total of previous estimate	60,561 40
	Value of work done in August	$46,236 50
	Amount retained	9,247 30
	Amount due	$36,989 20

JNO. R. KENLY,
Res't Engineer.

The above estimate and the deductions therefrom have been examined and are approved by me.

——— ———,
Chief Engineer.

— hereby acknowledge to have received from the Union Railroad Company the sum of —, in payment of the amount estimated to be due on the above account.

——— ———,
Contractor.

———, 187–.

[Endorsed:] Section No. 1. Estimate No. 4. Union railroad. Monthly estimate for August, 1871. Amount paid, $36,989.20. Dully, Wiley & Andrews, contractors. Force on 31 August, 1871, 359 men, 140 horses.

247 Section No. 1. Estimate No. 5.

Monthly Estimate for September 1871.

Engineering Department, Union Railroad.

I certify that the following is a correct estimate of the quantity, character, and value of work done by Dull, Wiley & Andrews, contractors, up to the 30th of September, 1871, in accordance with their articles of agreement with the Union Railroad Company for the graduation, masonry, and ballasting of section No. 1 of said road, and that the deductions therefrom are true statements of the value of work executed by them during the month of September, 1871, and the amount due therefor, as stipulated in said agreement.

Quantity.	Character.	Value.
		Dollars. Cts.
8,656 cubic yards	Earth excavation, at 30 cents	2,596 80
	Loose rock excavation	
5,436 "	Solid rock excavation, at 1.50	8,154 00
500 "	Replaced over tunnel, at 35 cents	175 00
	Tunnel bottoming excavation	
639 "	Tunnel shafting excavation, at 8.00	5,112 00
67,799 "	Tunnel, open cut, excavation, at 75 cents	50,849 25
83,030 "	Hauled 1,800 feet (embankment), 1¼, at 22½ cents	18,681 75
	Packing over tunnel arch, &c.	
928 "	Brick-work in tunnel and shafts, at 9.50	8,816 00
1,559 "	Stone masonry, " " at 9.00	14,031 00
2,065 "	Retaining-wall masonry, at 9.00	18,585 00
94 "	Skew-back, at $20.00	1,880 00
80 "	Rectangular culvert masonry, at 6.00	480 00
296 "	Arched " " at 9.00	2,664 00
80 "	First-class bridge " at $11.00	880 00
	Second-class " "	
	Ballast	
	Clearing and grubbing	
1,000 c. yds.	Stone delivered, at $4.00	4,000 00
1,000 "	Brick " at 6.00	6,000 00
	Total	$142,904 80
	Total of previous estimate	106,797 90
	Value of work done in September	$36,106 90
	Amount retained	7,221 38
	Amount due	$28,885 52

JNO. R. KENLY,
Res't Engineer.

The above estimate and the deductions therefrom have been examined and are approved by me.

——— ———,
Chief Engineer.

— hereby acknowledge to have received from the Union Railroad Company the sum of —, in payment of the amount estimated to be due on the above account.

——— ———,
Contractor.

———, 187—.

[Endorsed:] Section No. 1. Estimate No. 5. Union railroad. Monthly estimate for September, 1871. Amount paid, $28,885.52. Dull, Wiley & Andrews, contractors. Force on 30th September, 1871, 313 men, 89 horses.

248 Section No. 1. Estimate No. 23.

Monthly Estimate for March, 1873.

Engineering Department, Union Railroad.

I certify that the following is a correct estimate of the quantity, character, and value of work done by Dull, Wiley & Andrews, contractors, up to the 31st of March, 1873, in accordance with their articles of agreement with the Union Railroad Company for the graduation, masonry, and ballasting of section No. 1 of said road, and that the deductions therefrom are true statements of the value of work executed by them during the month of March, 1873, and the amount due therefor, as stipulated in said agreement:

Quantity.	Character.	Value.
		Dollars. Cts.
22,361 cubic yards	Earth excavation, at 30 cents	6,708 30
	Loose rock excavation	
36,128 "	Solid rock excavation, at 1.50	54,192 00
137,527 "	Replaced over arch, at 35 cents	48,134 45
11,900 "	Tunnel bottoming excavation, at 5.00	59,500 00
639 "	Tunnel shafting excavation, at 8.00	5,112 00
223,971 "	Tunnel recesses, open cut, at 75 cents	167,978 25
432,526 "	Hauled 1,100 feet (embankment), 1¼, at 13¾ cents	59,472 32
	Packing over tunnel arch, &c.	
17,096 "	Brick-work in tunnel, at 9.50	162,412 00
18,196 "	Stone masonry " at 9.00	163,764 00
5,884 "	Retaining-wall masonry, at 9.00	52,956 00
682 "	Skew-back, at $20.00	13,640 00
80 "	Rectangular culvert masonry, at 6.00	480 00
591 "	Arched " " at 9.00	5,319 00
2,361 "	First-class bridge " at 11.00	25,971 00
50 "	Second-class " culvert W. E., at 9.00	450 00
	Ballast	
	Clearing and grubbing	
400 c. yds.	Stone delivered, $4.00	1,600 00
300 "	Brick " $6.00	1,800 00
	Total	$829,489 32
	Total of previous estimate	801,518 40
	Value of work done in March	$27,970 92
	Amount retained	5,594 18
	Amount due	$22,378 74

JNO. R. KENLEY,
Res't Engineer.

The above estimate and the deductions therefrom have been examined and are approved by me.

——— ———,
Chief Engineer.

— hereby acknowledge to have received from the Union Railroad Company the sum of — in payment of the amount estimated to be due on the above account.

——, 187–. —— ——, *Contractor.*

[Endorsed:] Section No. 1. Estimate No. 23. Union railroad. Monthly estimate for March, 1873. Amount paid, $22,376.74. Dull, Wiley & Andrews, contractors. Force on March 31st, 1873, 301 men, 55 horses.

249 *Defendants' Testimony.*

20TH JUNE, 1882.

HENRY D. WHITCOMB, a witness for the respondents, being by me first carefully examined and cautioned, and duly sworn according to law to testify the whole truth, and being examined on behalf of the respondents, makes oath, deposeth, and saith as follows, to wit:

My name is Henry D. Whitcomb; I am about fifty-six years of age; reside in Richmond, Virginia, and am by profession a civil engineer.

1 Q. Were you one of the arbitrators mentioned in the agreement of reference made between James J. Dull, surviving partner of the firm of Dull & Wiley, on the one side, and the Union Railroad Company on the other, mentioned in the proceedings in this case?

A. I was.

2 Q. Are you able to state what were the several items or particulars of the claim of the said Dull as presented before the said arbitrators? And if you are, please do so; and state which of the said items or particulars were allowed in whole or in part by the arbitrators, and which of them, if any, were disallowed, and what were the several allowances which entered into the award.

A. I have a memorandum furnished me by or through Mr. Machen at the time of the arbitration of the items of the claims made by them, on which I noted the items allowed or disal-
250 lowed. I here produce it, marked Respondents' Exhibit H. D. W. The items marked in pencil "A," on this exhibit, were allowed, and those marked "D" were disallowed. These marks were made at the time. The changes made in amounts in these items by the arbitrators are in pencil.

3 Q. In whose handwriting is the memorandum on the back of said Exhibit H. D. W. in pencil? I read it as follows:

"Allowed, $73,240.70
"Less, 19,081.50

"54,159.20"

"The $19,081.50 is for damage to buildings and contents."

And when was the same made?

A. I made it at the close of the arbitration, and it is in my handwriting.

4 Q. Please look at Exhibit J. J. D. now shown you, now filed

with the commissioner, and say whether or not you recognize the same.

A. I believe this to be the paper which was in the possession of Mr. Henry Tyson. I recognize his handwriting. The arbitrators requested Mr. Tyson to make out the award, and he seems to have been more particular in making his entries in ink than I was.

5 Q. Please say what portions of the writing and figures in the said Exhibit J. J. D. are in Mr. Henry Tyson's handwriting.

A. All the changes made in this paper are in the handwriting of Mr. Tyson, and on the third page, from the words "allowance to Dull, Wiley & Andrews" to "Henry Tyson," inclusive.

251 6 Q. In whose hadwriting are the words "Not proved," in parenthesis, in three places on the first page of said Exhibit J. J. D, the memoranda in parenthesis on the second page and the last line of the said second page, "Allowance in lieu of all claims for haul, $20,000," and the line in parenthesis on the third page, at the bottom of the first paragraph, "Allowance in $20,000, in last page, includes lift," and also the words in parenthesis on the third page, "Allowed on first page?"

A. I believe all that writing is in the hand of Mr. Tyson.

7 Q. Was John Ellicott examined as a witness before said arbitrators, and if he was, please state to which of the items of the claim of the contractor, Dull, his testimony related.

A. He was a witness before the arbitrators. I recollect his testifying as to the change of plan of the masonry in the tunnel, which was claimed to have been made after the work was let. That would refer to the item of "3,175.11," that of "8,450," and that of "4,220," shown on Exhibit H. D. W. I don't intend to say that this was all that General Ellicott testified to at the time, but this, in regard to these items, is all that occurs to me at present. I recollect he stated that he was associated with Mr. Manning in the early part of the work.

8 Q. Were all the said items in regard to which Mr. Ellicott testified, according to your recollection, disallowed by the arbitrators.

252 A. The claim for damages for the changes in the thickness in masonry were disallowed.

Cross-examined:

1 X Q. Do you not remember that John Ellicott was examined in regard to the allowance for haul on behalf of the contractor?

A. I cannot remember that he was. It made no impression on me if he was.

2 X Q. Did you remember his being examined as to the items you have given until your recollection was refreshed by the suggestion from Mr. Machen; or, in other words, had you any certain recollection about it?

A. My recollection was very indistinct until Mr. Machen called my attention to his evidence in regard to the change of plan. I then recollected that General Ellicott had testified that by the original

plan the wall was to have been six bricks thick, and that it was afterwards changed to five.

3 X Q. Did not General Ellicott make the assertion that the company's engineers had shown a plan for the tunnel to the bidders, and produced before the arbitrators a different paper, which they alleged to be the original plan, and was there not an angry controversy upon that subject before the arbitrators?

A. I remember that General Ellicott, in substance, stated something of that kind, but I don't know that I should put it as strong as the question does. I think there was some feeling shown
253 between General Ellicott and the engineers of the company, but to what extent I cannot now remember.

4 X Q. Did you, or the other arbitrators, to your knowledge, know that John Ellicott had a secret interest, or any interest, in the construction contract, or in any monies that Dull could recover?

A. I did not. I never heard the subject mentioned until some time after—a year or eighteen months, I suppose—when I got a letter from General Ellicott on the subject.

5 X Q. Can you remember the nature of the controversy of the haul claimed for, and for which you made an allowance of $20,000?

A. The difference between the arbitrators and engineers of the company was, as I understand, that we allowed for the lift out of the cut. The contractors had erected derricks or cranes for lifting out of the cut, instead of constructing roads up the side of the cut, by which the material could be hauled out in carts.

6 X Q. From the depth and narrowness of the cut and the fact that the tunnel was to be constructed in the bed of a street, the company having no rights outside of the street?

(Question withdrawn.)

H. D. WHITCOMB.

I, George Morris Bond, a commissioner as aforesaid, do also certify that the reason for taking the foregoing deposition of Henry D. Whitcomb was and is, and the fact was and is, that the said de-
254 ponent was examined in pursuance of a commission to me issued in this case; and I do also certify that the deponent was by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and that the foregoing deposition was then reduced to writing by me, and thereafter subscribed by the said deponent in my presence; and I do further certify that I am not of counsel or attorney for either of the parties to the said cause, and that I am not interested in the event of the said cause.

Given under my hand and seal, at the city of Baltimore, within the district of Maryland, this twentieth day of June, in the year of our Lord one thousand eight hundred and eighty-two.

{ Seal of Commissioner Circuit Court for the District of Maryland, United States. }

GEORGE MORRIS BOND,
U. S. Commissioner for Maryland.

255 9TH JUNE, 1883.

JOHN ELLICOTT, a witness for the respondents, being by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and being examined on behalf of the respondents, makes oath, deposeth, and saith as follows, to wit:

My name is John Ellicott. I reside in Baltimore city, and am an architect and civil engineer.

1 Q. Are you one of the defendants in this case?

A. I am.

2 Q. Were you employed upon the Union Railroad Company in any manner in or about the year 1871; and, if you were, what was the nature of your said employment and your connection, if any, with the Union Railroad Company, and when did said employment begin and how long did it continue?

A. I was employed on the Union railroad by Charles P. Manning, the chief engineer, to represent him professionally during his absence on work conducted by him in the State of Ohio during that time. My employment commenced in the fall of 1870 and terminated in the fall of 1871.

3 Q. What work did you do in that connection preliminary to the letting of the construction of the tunnel?

A. I directed the location and such surveys as were necessary to prepare for the letting of the work in the absence of the chief engineer; when he was here he gave his own orders.

256 4 Q. When did Mr. Manning return from the West and take personal charge, and was it or not before the letting of the contract work?

A. Mr. Manning returned and conducted the letting; he may have gone back and forth to Ohio at intervals, but was considered in actual charge of it. I cannot give you the exact date when his work in the West ceased.

5 Q. By whom were you paid for your services so rendered?

A. By Mr. Manning, out of his salary.

6 Q. Had the arrangement between Mr. Manning and yourself the sanction of the Union Railroad Company?

A. It had—that of the president.

7 Q. Had you anything to do with the letting of the work beyond the preliminary surveys and other services as engineer to which you have referred?

A. I had not. I was present when the bids which had been received from time to time were brought to the Union railroad office by Mr. William G. Harrison from his insurance office, where they had been deposited by him, unopened, for safe-keeping.

8 Q. Were you acquainted before the letting; and, if yea, how long before, with Messrs. Dull, Wiley and Andrews?

A. I never knew Wiley until he came to the office just before the letting; did not know Dull even by sight, but I knew Andrews from boyhood.

9 Q. Did you before the letting render them or either of them any assistance or information in regard to the work or the letting

beyond that which was furnished to other proposed bidders or inquirers?

257 A. I did not.

10 Q. After the letting of the work what was the character of the service which you rendered to the railroad company, and what connection, if any, had it with the performance of the work under the contract?

A. None at all; but I simply remained ready to answer for Mr. Manning should he be absent.

11 Q. Did you have anything to do with the measurement of the work done by the contractors or the making the estimates or with the allowances therein contained?

A. I never handled a field instrument, chain, tape-line, or rod on the work; I never made a measurement for an estimate, nor did — ever see one made, nor did I ever see an estimate after it was made; I never classified materials in any shape or form.

12 Q. Did the work which you performed before the letting and preparatory to it receive the approval of the chief engineer, Mr. Manning?

A. Entire and complete in every respect.

13 Q. Were you consulted with reference to the letting of the work to Dull, Wiley, and Andrews, and had you any part in the acceptance of the bids made for it?

A. I was not consulted and took no part in the letting of the work or the acceptance of the bid.

14 Q. Look at Complainant's Exhibits "J. C. W.," Nos. 9, 10, 11, 12, 13, and 13½, and say what you know about them.

A. They are receipts for five months' salary of the chief engineer, which was at the rate of $5,000 per annum. Said amounts

258 were drawn by Mr. Manning, the chief engineer, from the company and divided with me, as per an agreement between him and myself; we jointly received the money. After the severance of my connection with Mr. Manning he continued to draw the said salary without abatement. A portion of the last month I served with Mr. Manning he drew the amount and I receipted to him individually for my share.

15 Q. Look at Complainant's Exhibit "J. C. W. No. 14," which is a check for $464.05, and say whether or not that was for salary or compensation of yours as engineer?

A. This check was drawn to my order by the president, in the absence of the chief engineer, for disbursement in paying the assistants then in the corps; none of it was for my services.

16 Q. Can you state the time when your connection with the Union Railroad Company and Mr. Manning as its engineer ceased finally. If you can, state when it was, or give as near an approximation to the time as you are able.

A. I can't name the day, but it was in the fall of 1871—possibly in the month of September; my last services referred to included a portion of this month; if September it was, it is a matter of record.

17 Q. Did you at any time while your said employment lasted and after the letting to Dull and Wiley, or Dull, Wiley and Andrews,

Manning, and did you not dispute his right to terminate your employment upon the work?

A. I never claimed to be coequal with Mr. Manning, but thought harshly of his terminating my connection with him as suddenly as he did, giving no notice of his intention until he notified me that, as he had completed his work in Ohio, he could give his personal attention uninterruptedly to the work of the Union Railroad Company and would no longer need my services.

7 X Q. When did you receive from Mr. Manning the notification to which you referred in your last answer?

A. As well as I can recollect, it was some time during September, 1871; I have no record of it, but it was pretty soon after my
263 return from the White Sulphur Springs, and will not vary far from that time.

8 X Q. From the date of your original employment, in the fall of 1870, until July 31st, 1871, did you not receive one-half of the salary which was payable by the company to Mr. Manning.

A. I did—from Mr. Manning, but never received one dollar from the company directly. When I was appointed Mr. Harrison, the president, declined to recognize two officers and to create an additional salary. He told Manning that he could employ me and pay me out of his own salary; it would be satisfactory to him.

9 X Q. Do you remember when the advertisement was made inviting proposals on the construction of the work?

A. It was in the spring of 1871, but I cannot tell what month.

10 X Q. Do you remember when the bids received were opened or when the contract was awarded?

A. I cannot determine that; it is a matter of record I have no possession of.

11 X Q. During the interval between the advertisement inviting proposals and the letting of the contract, was not Mr. Manning still engaged upon work in Ohio, and during the greater part of the time absent from the city?

A. He had not completed his work in Ohio, but made it his business to be here during that time and give his personal attention to it.

12 X Q. Do you mean to say that he was present during all of that time, or the greater part of that time? What is your testimony upon this point?

264 A. My recollection is that he was here the entire time; if not, the most of it.

13 X Q. You cannot, however, say precisely when this was—I mean, during what month or months of the spring of 1871?

A. I can't recollect the month.

14 X Q. When was work commenced under the contract?

A. I don't recollect.

15 X Q. How soon after the contract was awarded—if you recollect?

A. I don't know.

16 X Q. What progress had been made on the work when your connection with the same ceased?

A. I can't tell how much, because I never went on the work to observe.

17 X Q. Did you never, after the commencement of the work and before your connection with the same ceased, visit the work on horseback for purposes of inspection?

A. Never; can recollect having driven to Canton once to deliver some message from Mr. Harrison to a man living there. I drove once or twice by the top of the cut and looked down from my wagon.

18 X Q. Was Mr. Manning continuously present and in personal charge of the work in the months of June and July, 1871?

A. No; I think not

19 X Q. Do you say that neither before or after your visit to the White Sulphur Springs, in August, 1871, did you give any personal attention to the work of construction?

A. I never did during my connection with Mr. Manning.

265 20 X Q. In answer to the 20th question on your direct examination you state that Mr. Shoemaker referred to an interest of his in the contract, and remarked to you that if there should be a profit he would divide his profit with you; when and where did this conversation take place?

A. Mr. Shoemaker referred to his interest in the contract and offered to divide any profit which might accrue with me as an act of kindness on his part, but when and where I have no recollection.

21 X Q. In your answer to the same question you further state that you were pleased to thank him for his kind offer, not supposing for one moment that you would ever realize one cent; why did you not suppose that you would ever realize one cent?

A. Because it was an uncertainty on the part of everybody whether it would ever realize anything, and it made no impression on me beyond the promise made at the time.

22 X Q. In your answer to the same question you further say: "But as time rolled by I was more than pleased to realize from the promise made;" when did you first begin to realize from the promise made?

A. I can't recollect.

23 X Q. Can't you tell how long it was after the promise before you realized anything from it?

A. I can't recollect the time.

24 X Q. How much did you realize in amount, if you cannot say when?

A. I can't name the amount, but in the neighborhood of

266 thirteen thousand dollars; I think it was twelve thousand five hundred dollars, as near as I can recollect.

25 X Q. Did you receive all of this sum at one time?

A. No; at four times.

26 X Q. What was the amount of the first payment, if you remember?

A. The first was eight hundred dollars and the second two thousand dollars, and afterwards a larger amount was received from Wiley, and subsequently the company's note for thirteen hundred and some dollars from Dull.

27 X Q. From whom did you receive the first payment on account of profits arising under the contract?

A. I received the first three from Wiley and the last from Dull.

28 X Q. And the third payment, I understand you to say, was much larger in amount than any of the others; can you not state the amount?

A. I can't state amount, but it was larger—very much larger.

29 X Q. Can you not give the date of any of these payments?

A. I cannot.

30 X Q. Were either or all of said payments made by check; and, if so, whose check or checks, and upon what bank or banks?

A. I never received a check. Three payments were in money and the fourth was the note referred to above.

31 X Q. By money, in your answer to the last question, you mean currency, do you not?

A. I mean currency.

32 X Q. And you say that the third of these payments, largely exceeding in amount the others, was equally with the two pre-
267 ceding payments of eight hundred and two thousand dollars, respectively, made to you in this way?

A. They were all made in currency except the note.

33 X Q. Where were these payments made?

A. I don't recollect the two first, but the third was in Barnum's Hotel, and the fourth, being the note, was in Harrisburg, Pennsylvania.

34 X Q. Have you no means of fixing the exact date of any of these payments?

A. I have not, though I have tried my best to do it even by circumstances, but I can't do it at all.

35 X Q. Were any statements of account furnished you on the occasion of these payments, or at any time, by said Wiley showing the amount coming to you as your proportion of said profits?

A. I never had a statement of any kind, but did estimate roughly what my interest might amount to, but this was only approximate; I figured it out as a matter of curiosity; I never had any statement from them. I had a paper handed me by Mr. Lanahan showing the amount of the award, which I returned to him.

36 X Q. Which of said payments were made before and which after the award?

A. The three first were made before and the last after the award.

37 X Q. On the occasion of said payments did any receipts pass between you and said Wiley or Dull, or did you ever receipt in any form for the monies so received by you from them?

A. I don't recollect giving a receipt for any of the amounts; I don't think I did.

268 38 X Q. Did you ever, either at Harrisburg or elsewhere, either during the life of Wiley or since his death, make any examination of the books of said Dull and Wiley, or either of them, for the purpose of ascertaining the state of accounts between you and them and the amount of profits to which you were entitled?

A. I never did but once. I had curiosity to know, and was shown

a check-book that had belonged to Wiley, and which was in the hands of a man by the name of Locke, and found nothing but a stub showing the amount which had been paid to Shoemaker by said Wiley, out of which amount I received nothing; this was subsequent to the death of Wiley.

39 X Q. When was this, as nearly as you can remember, and where was said check-book shown you?

A. I have no recollection of the date, but simply know it was after his death, and in a house on Fayette street, near Calvert, formerly kept by Rennert. Locke told me that he had the book and produced it from behind the counter, and I looked at it and returned it to him.

40 X Q. Who is said Locke, and what connection had he with said business of said Wiley, or said Dull and Wiley?

A. He is a stone-mason, and I think was a boss for Wiley; what other connection he may have had, I know nothing about.

41 X Q. I will now read a portion of your answer in this case, in which you say that during the lifetime of Wiley you received from the contractors through him $12,400, and after his death and
269 subsequently to the award, in a note of the Union Railroad Company from Dull, $1,298.14, making the aggregate received by you on account of your share of profits, $13,698.14. So far as there is any discrepancy between these figures and those given in your present examination, what have you to say?

A. In my testimony of to-day I gave figures from mere memory, but I now recognize the figures in my answer as correct.

42 X Q. You were a witness for the contractors before the arbitrators, and testified in regard to the identity of a certain drawing or plan which was produced for the purpose of showing that there had been a change of plan, so far as the thickness of the brick-work of the tunnel was concerned; is not that so?

A. It is so.

43 X Q. Did you not also testify, as an expert, in regard to other items or points in controversy in behalf of the contractors?

A. I have no recollection of having done so.

44 X Q. Not in regard to the contractors' claim for an allowance for damages caused by the caving in of part of the work?

A. I have no recollection of it.

45 X Q. Nor in regard to their claim for a lift of material by derricks in excavation?

A. I have no recollection of having done so, and was ignorant of the nature of their claim against the company.

46 X Q. Can you state positively that you did not testify as an expert in regard to either of these last-mentioned points?

A. I have no recollection of having done so, and am pretty sure I did not.

270 47 X Q. In the check-book which was shown to you by Locke, are you sure that there were no stubs or memoranda upon stubs relating to the payments which were made to you?

A. There was one stub upon which was written in pencil an

amount, which I have forgotten, with "J. E." written also in pencil; that was all.

48 X Q. What is Locke's name—is it Milo Locke?

A. It is.

Re-examined:

23 Q. Were the specifications, after being compiled under your direction, as you have testified in answer to the 2nd cross-question, submitted to Mr. Manning for his consideration?

A. They were submitted and had his approval.

24 Q. In answer to the 20th cross-question you have stated that you had no recollection when and where Mr. Shoemaker's promise or offer to divide with you any share of profit that might accrue to him was made. Was it made before or after the letting of the work.

A. It was long after the letting of the work.

25 Q. In your answer to the 18th cross-question you stated that you thought Mr. Manning was not continuously present and in personal charge of the work in the months of June and July, 1871. Do you know who was in charge of the work during Mr. Manning's absence or absences during the months referred to?

A. I represented Mr. Manning in his absence during those months.

271 26 Q. Had you personal charge of the work?

A. I had not.

27 Q. Who had?

A. Mr. Kenley, the resident engineer.

JOHN ELLICOTT.

I, George Morris Bond, a commissioner as aforesaid, do also certify that the reason for taking the foregoing deposition of John Ellicott was and is, and the fact was and is, that the said deponent was examined in pursuance of power conferred by virtue of a commission herewith returned and to me issued in this case.

And I do also certify that the deponent was by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and that the foregoing deposition was then reduced to writing by me and thereafter subscribed by the said deponent in my presence; and I do further certify that I am not of counsel or attorney for either of the parties to the said cause, and that I am not interested in the event of the said cause.

Given under my hand and seal, at the city of Baltimore, within the district of Maryland, this nineteenth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

{ Seal Commissioner Circuit Court for the District of Maryland, United States. }

GEORGE MORRIS BOND,

U. S. Commissioner for Maryland.

272 19TH DECEMBER, 1883.

ARTHUR W. MACHEN, a witness for the respondents, being by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and being examined on behalf of the respondent, makes oath, deposeth, and saith as follows, to wit:

My name is Arthur W. Machen. I am of lawful age. I reside in Baltimore city and am a practicing attorney of the Baltimore bar.

1 Q. State, if you please, whether you were the counsel of J. J. Dull in the trial of the arbitration before Mess. Tyson, Martin, and Whitcomb, mentioned in these proceedings, and in which The Union Railroad Company was the defendant.

A. I was counsel. I was employed on behalf of Dull and Wiley, in the lifetime of Colonel Wiley, in the matter of their controversy with the Union Railroad Company, and as their counsel or the counsel of Mr. Dull, the survivor, prepared, in conjunction with Mr. Fisher, the counsel of the Union Railroad Company, the agreements under which the said arbitration was had, and attended at the trial before the said arbitrators.

2 Q. State, if you please, whether General John Ellicott was examined as a witness for the plaintiff in that case—the plaintiff J. J. Dull; and, if yea, state the subjects upon which he was examined.

273 A. General Ellicott was examined as a witness on behalf of the plaintiff, Dull, upon the question of the identity of a certain plan of the proposed tunnel produced by the Union Railroad Company before the arbitrators with a plan exhibited to persons contemplating bidding before any proposals were put in. That question affected certain items in the claim presented on behalf of the contractors, and which items are shown at the bottom of the first page of Exhibit J. J. D., filed with the commissioner in this case, and commencing with the words "damage to contractors by change of plan," and are three in number, to wit: "In substituting five rings of brick for six in arch of tunnel, in reducing thickness in walls of tunnel from six feet to five, and in substituting in part brick for stone in lining of tunnel between base and spring-line."

3 Q. Was General Ellicott examined as a witness in the case in reference to any of the items of the claim of the plaintiff, as set out in said Exhibit J. J. D., except the items which you have specified in your last answer?

A. He was not.

4 Q. Was General Ellicott examined in reference to the item claiming for additional haul, being the last item on the second page of the claim, as set out in said Exhibit J. J. D.?

A. My recollection is clear that he was not examined upon that branch of the case; I mean with reference to the claim — increased allowance for haul.

A. W. MACHEN.

274 I, George Morris Bond, a commissioner as aforesaid, do also certify that the reason for taking the foregoing deposition of Arthur W. Machen was and is, and the fact was and is, that the said

deponent was examined in pursuance of a commission hereunto annexed, and of an order of court passed in said cause.

And I do also certify that the deponent was by me first carefully examined and cautioned and duly sworn according to law to testify the whole truth, and that the foregoing deposition was then reduced to writing by my sworn clerk, and thereafter subscribed by the said deponent; and I do further certify that I am not of counsel or attorney for either of the parties to the said cause, and that I am not interested in the event of the said cause.

Given under my hand and seal, at the city of Baltimore, within the district of Maryland, this nineteenth day of December, in the year of our Lord one thousand eight hundred and eighty-two.

{ Seal Commissioner Circuit Court for the District of Maryland, United States. }

GEORGE MORRIS BOND,
U. S. Commissioner for Maryland.

275 *Defendants' Exhibits.*

EXHIBIT J. C. W. No. 1.

Account.

ENGINEERING DEPARTMENT, *October*, 1871.

No. —. Union Railroad Co. to Charles P. Manning, Dr.

1871.		
Nov. 1.	For services as chief engineer from the 1st to the 31st of October, one month, at $5,000 per year	$416 66

Received of Union Railroad Company, by hands of the treasurer, four hundred and sixteen dollars, in full of the above account.

$416.66. CHARLES P. MANNING.

276 *Statement of Items.*

EXHIBIT J. D. W. No. 2.

DULL *vs.* UNION RAILROAD CO.

Balance appearing to be due the contractors upon the estimates and accounts as furnished by company		28,630 98 (*a*.)
Interest thereon at 6 per cent. from July 15, 1873 (*a*)		
In addition thereto the contractors claim for—		
500 2,000 cubic yards of stone purchased by them and used by company for ballast, at $4 per yard	2,000	8,000
7,600 15,200 cubic yards shrinkage of replaced earth (10 per cent. upon 152,000 yards), at 35 cts.	5	5,285

	7,600			
Haul of the said 15,200 yards, at 3,710 feet or haul for replaced material			2,642 50	
			1,040	
(Mr. Hutton's average haul)			7,049	
Cost of reconstructing break in tunnel arch			5,178 07	(a.)
Damage to contractors by change of plan in substituting 5 rings of brick for 6 in arch of tunnel			3,175 27	D.
277 Damage in reducing thickness of sustaining walls of tunnel from 6 feet to 5, 17,900 cubic yards, at 50 cts.			8,450	D.
Damage in substituting in part brick for stone in lining of tunnel between base and spring-line, as follows:				
Amount of brick-work so substituted for stone, 4,220 cubic yards, cost of brick per yard	$5 50			
Cost of stone per yard	4 00			
Difference in material	1 50			D.
Credit by difference in price paid under contract, 9.50 — 9.00	50			
Net loss	1 00			
4,220 × 1			4,220	D.
1,150 cubic yards, fall in drift, at $5, contract price for drifting			5,750	D.
Haul of this 3,710 feet, Mr. Hutton's average			426	D.
1,150 cubic yards replaced over tunnel in filling the depression of the surface, at 35 cts.			402	(a.)
Haul of this 540 feet			62	(a.)
1,000 feet, lineal, of ditch excavated in solid rock, costing contractors in excess of price of common rock excavation, $2 per foot			2,000	D.
278 Extra cost of constructing eastern approach walls with ashlar facing			320	(a.)
			9,316 02	(?)
14,000 cubic yards of excavation from barrow pits, at 30 cts.			4,200	D.
3,300 cubic yards of excavation not embraced in engineer's cross-sections, as calculated by Mr. Marinet, at 75 cts.			2,475	D.
Haul of this 3,710 feet, Mr. Hutton's average			1,530 37	D.
3,300 yards replaced, at 35 cts.			1,155	D.
Additional haul for which contractors are entitled to be allowed upon material included in the estimates, viz:				
According to calculations of Mr. Hutton	57,215 40			
Less	7,344 66			
			49,870 74	

N. B.—Mr. Yonge's estimate for the whole work is	98,874 43	
Amount allowed in the estimates	49,133 91	
Difference	45,740 52	
279		147,175 45
An allowance of 100 feet, horizontal for 6 feet vertical would amount upon 123,382 yards, over and above the estimates of company's engineer, to (see Mr. Yonge's calculation)	$15,979,72	20,000 00
Interest from July 15th, 1873, to July 18th, 1873, on	$25,000	
Interest from July 15th, 1873, to July 21st, 1873, on	25,000	
Interest from July 15th, 1873, to February 24th, 1874	5,000	
Interest from July 15th, 1873, to March 3d, 1874	10,000	
		608 66
		147,784 11

Interest on whole amount (except $608.66) from July 15th, 1876, to this time.

279¼ Articles of agreement made and concluded this — day of ——, in the year of our Lord eighteen hundred and —, by and between —— ——, of the first part, and the Union Railroad Company, of the second part, witnesseth:

That, for and in consideration of the payments and covenants hereinafter mentioned to be made and performed by the said Union Railroad Company, the said party of the first part do hereby covenant and agree to construct and finish, in the most substantial and workmanlike manner, to the satisfaction and acceptance of the chief engineer of said Union railroad, all the — and such other work connected therewith as may be necessary to finish the said —, in accordance with the following specifications, so far as they may be applicable, and agreeably to the directions of the said chief engineer or his assistant in charge of the said work for the time being which may be given from time to time during the progress of the work, and to complete the same on or before the — day of ——, eighteen hundred and —, it being expressly agreed that the time herein stipulated shall be of the essence of this contract.

Specifications.

1. Graduation.—Under this head will be included all clearing and grubbing and all excavations and embankments required for the formation of the road-bed or in any way connected with or incident to the construction of the same.

2. The clearing shall be of a width not less than sixty-six feet and as much more as the depth of cut or fill may require, and in

every case shall extend ten feet beyond the slope-stakes. In fillings of one and a half feet or less the trees and stumps must be grubbed, and in other cases they must be cut close to the surface of the earth.

3. The road will be graded for a double track throughout and in conformity with such breadths, depths, and slopes of cutting and filling as may be determined by the engineer.

4. The excavation will be divided into three kinds, viz., earth, loose rock, and solid rock. Under the head of earth will be included clay, sand, gravel, loam, and all other matters of an earthy kind, however hard, stiff, or compact, and all boulders containing less than three cubic feet each. Under the name of loose rock will be included all stone and detached rock found in separate masses containing not less than three cubic feet nor more than one cubic yard; also all slate or other rock soft or loose enough to be removed without blasting, although blasting may be occasionally resorted to. By solid rock will be understood all rock found in masses containing upwards of one cubic yard, and which can be best removed by blasting. The bids will be made separately for each kind of material as just described.

5. Such ditches shall be dug within or without the limits of the road, as the engineer may direct.

6. Materials necessarily wasted from the cuttings shall be deposited in the vicinity of the road according to the directions of the engineer.

7. Materials required for embankment, and not supplied by the excavations within the line of the road, shall be obtained from the places and in the manner directed by the engineer.

8. The road shall be secured against damage from all water-courses in the vicinity thereof or in contact therewith by building or facing the embankment with stone or by widening the existing or excavating new channels, or in such other manner as the engineer may direct.

9. Commodious passing places for all public and private roads crossing or in contact with or adjacent to said railroad shall be opened and kept in good condition, and sufficient fences shall be provided and maintained for the preservation of all growing crops, by the contractor.

10. The contractor, when directed by the engineer, shall lay aside for ballast for the rail tracks, in such places as may be pointed out, any excavated rock or stone, allowance being made, according to the judgment of said engineer, for such material as may be required to supply any deficiency in the embankment thereby occasioned.

11. The distribution of materials directed by the engineer must be strictly adhered to.

12. The excavation and embankment will be paid for separately; the price of excavation being intended to pay for the removal of all material found within the limits and above the grade of the road, or taken from new channels cut for streams, or from ground excavated for roads, or for obtaining embankment for other purposes outside of said limits; the price of embankment being intended to pay for the sup-

personal superintendence to the work or discharge him from responsibility for its execution according to the contract.

8. Whenever in this contract the word "engineer" is used it is to be understood as applying to the local or resident engineer having charge of the particular work for the time being, except in those cases wherein the chief engineer is expressly mentioned.

9. The contractor must carefully preserve the bench marks, stakes, and levels given by the engineer, and in case of neglect in this particular will be charged with the resulting expense.

279½ In consideration whereof the said Union Railroad Company doth hereby agree with the said part- of the first part that the said company shall and will, for doing and performing the work aforesaid, in the manner aforesaid, well and truly pay or cause to be paid to the said part- of the first part, — executors or administrators, the following prices, viz:

The above payments shall be made in the following manner— that is to say: During the progress of the work, and until it is completed, there shall be a monthly estimate made by the aforesaid engineer of the quantity, character, and value of the work done during the month or since the last monthly estimate, four-fifths of which value shall be paid in cash to the said part- of the first part, at the office of said Union Railroad Company, on or before the fifteenth day of each month, and, when the said work is completed and so accepted by the said chief engineer, there shall be a final estimate made by the engineer of the quantity, character, and value of said work, agreeably to the terms of this agreement, when the balance appearing to be due to the said part- of the first part shall be paid to — upon — giving a release, under seal, to the said Union Railroad Company from all claims or demands whatsoever growing in any manner out of this agreement.

And it is expressly covenanted and agreed between the parties aforesaid that the monthly and final estimate of the engineer shall be conclusive between the parties to this contract, the former for the time being and the latter for all time, without further recourse or appeal; the monthly estimates of the engineer being, however, subject to correction by him in any subsequent monthly or in his final estimate, for the reason that the monthly or current estimates, being merely made out as a basis for payment on account, will necessarily be only approximately correct, pains being taken, however, to make them as accurate as possible; and if the chief engineer deems it proper at any time to revise and alter, in such manner as he may see fit, the monthly or final estimate of said engineer, then the estimate of said chief engineer shall be substituted, to all intents and purposes, in place of the estimate of said engineer; it being, however, wholly optional with the said chief engineer to exercise such power of revision or not. And it is further covenanted and agreed that all extra work required and not embraced under the items and prices above set out shall be done by the contractor at the estimate of the engineer, and said engineer shall embody in each monthly estimate a bill for the same, made out as correctly as possible, for the month preceding; this bill shall be final for each

month, and the acceptance of the estimate by the said contractor shall be deemed and taken as waiving any further claim for or on account of extra work done up to that time.

It is further agreed and understood that the work embraced in this contract shall be commenced within — days from the date hereof, and prosecuted with such force as the engineer shall deem adequate to its completion within the time specified in this agreement; and if at any time the said part- of the first part shall refuse or neglect to prosecute the work with a force sufficient, in the judgment of the engineer, for its completion within the time specified, then and in that case the engineer in charge, or such other agent as the chief engineer shall designate, may proceed to employ such number of workmen, laborers, and overseers as may, in the opinion of the said chief engineer, be necessary to insure the completion of the work within the time hereinbefore limited at such wages as he may find it necessary or expedient; to pay all persons so employed, and charge over the amount so paid to the part- of the first part as so much money paid to said part- of the first part on — contract.

And it is hereby further agreed that, in case the said part- of the first part shall not well and truly from time to time comply with and perform all the terms hereinbefore stated and stipulated on — part in manner and form and within the time hereinbefore mentioned, or in case it should appear to said chief engineer that the work does not progress with sufficient speed or in a proper manner, or in case of interference with said work by legal proceedings instituted against the part- of the first part by other parties than the said company, the said chief engineer shall have power to annul this contract, if he sees fit so to do, by serving a notice in writing upon said part- of the first part, if — be upon the work to receive it, or by posting such notice upon the door of — usual dwelling or boarding-house, or any public place on or near the work, if — be absent therefrom, when, upon such serving of said notice, the foregoing agreements upon the part of the said company, and every clause and part thereof shall become null and void, and the unpaid fifth part of the value of the whole work done shall be forfeited by the said part- of the first part to the use of said company in the nature of liquidated damages. All right of occupancy in or upon any lands or property condemned for said company and all the rights whatever of said part- of the first part in and to any further prosecution of or interest in the work shall forthwith cease and terminate at the notice aforesaid, and the said party of the second part may contract anew for the work remaining to be done, or may employ any other person or persons to do and complete the work herein mentioned, or so much of it as may remain unfinished, as though this contract had never been made.

And it is further expressly agreed that the said company shall at any time have the right, without fault on the part of the part- of the first part, and for any reasons whatever that may appear sufficient to said company, upon giving thirty days' notice thereof to the part- of the first part, to suspend the execution of or annul this contract; in which event the said part of the first part shall be entitled to the

full amount of the estimates for the work done by — up to the time of such suspension or annulment without the deduction of one-fifth hereinbefore mentioned, and such suspension or annulment shall not give to the said part- of the first part any claim for damages against the said Union Railroad Company.

And the said part- of the first part hereby further covenant- and agree- to and with the said party of the second part that, in case it should be determined by the chief engineer to construct any further earthworks, bridges, culverts, drains, walls, or other works not now contemplated or hereafter enumerated upon or pertaining to the said section or sections, that the said part- of the first part will perform, construct, and complete the same as though the said work had been specifically set out herein, and for the prices hereinbefore stipulated to be paid for similar kinds of work, and upon the same terms and conditions, except with regard to the time of completing the same, which is hereby agreed shall be in that case reasonably extended, at the discretion of the chief engineer, when the limit fixed by him shall have the same effect as though it were inserted in this agreement.

And it is further agreed that, where this contract shall be executed with a firm or more than one person, the said firm or persons, prior to the first estimate, shall designate, in a power of attorney to be furnished by the engineer and afterwards deposited with him, some person or one of their number to receive and receipt for the current estimate, and this power they may, on notice to the engineer, revoke or alter at their pleasure, so that some one duly authorized by them shall always have full power to draw and receipt for current monthly estimates; but this shall not extend to final estimates, at the payment of which all the individuals signing this contract, or their personal representatives, must be present.

In witness whereof the said part- of the first part ha- hereunto set — hand and seal, and the party of the second part have caused the signature of their president and their corporate seal to be hereunto attached and attested by their secretary.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.
—— ——.

Done in duplicate on the day and year first above written.

full amount of the estimates for the work done by — up to the time of such suspension or annulment without the deduction of one-fifth hereinbefore mentioned, and such suspension or annulment shall not give to the said part- of the first part any claim for damages against the said Union Railroad Company.

And the said part- of the first part hereby further covenant- and agree- to and with the said party of the second part that, in case it should be determined by the chief engineer to construct any further earthworks, bridges, culverts, drains, walls, or other works not now contemplated or hereafter enumerated upon or pertaining to the said section or sections, that the said part- of the first part will perform, construct, and complete the same as though the said work had been specifically set out herein, and for the prices hereinbefore stipulated to be paid for similar kinds of work, and upon the same terms and conditions, except with regard to the time of completing the same, which is hereby agreed shall be in that case reasonably extended, at the discretion of the chief engineer, when the limit fixed by him shall have the same effect as though it were inserted in this agreement.

And it is further agreed that, where this contract shall be executed with a firm or more than one person, the said firm or persons, prior to the first estimate, shall designate, in a power of attorney to be furnished by the engineer and afterwards deposited with him, some person or one of their number to receive and receipt for the current estimate, and this power they may, on notice to the engineer, revoke or alter at their pleasure, so that some one duly authorized by them shall always have full power to draw and receipt for current monthly estimates; but this shall not extend to final estimates, at the payment of which all the individuals signing this contract, or their personal representatives, must be present.

In witness whereof the said part- of the first part ha- hereunto set — hand and seal, and the party of the second part have caused the signature of their president and their corporate seal to be hereunto attached and attested by their secretary.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.
—— ——.

Done in duplicate on the day and year first above written.

280 *Opinion. Filed 19th May, 1884.*

U. S. Circuit Court, District of Maryland. In Equity.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL & Others.

The defendant, James J. Dull, together with a certain William M. Wiley and R. Snowden Andrews, on the 1st day of May, 1871, entered into a contract (which was afterwards modified by a supplemental agreement) for the construction of a tunnel and other work upon the railroad of the complainant; and after the completion of the work and acceptance of it by the railroad company and part payment made according to its terms, an unsettled account existed between the parties, or between Dull & Wiley (who had bought out the interest of Andrews) and the railroad company, with reference to the work and the balance claimed to be due by said Dull and Wiley, and an action at law was instituted by said Dull (and said Wiley having meanwhile died) against the Union Railroad Company in the Baltimore city court, which, under an agreement between the parties, was referred to three engineers of eminence, who had been selected as arbitrators; and the arbitrators thereupon made an award in favor of the said Dull for the sum of $54,159.50, upon which judgment was entered by the said court on the
281 11th of January, 1877, after which a stay of execution upon certain terms was agreed to in consideration of the giving to the said Dull of certain promissory notes of the Union Railroad Company, guaranteed by the Canton Company of Baltimore, some of which notes subsequently were paid at maturity.

The bill in this case was filed in the circuit court of Baltimore city to restrain the collection of the remaining notes or enforcement of the said judgment, and praying other relief, on the alleged ground that a certain John Ellicott, who was acting at the time of the making of said construction contract as assistant to the complainant's engineer, had been promised by Samual M. Shoemaker, who was not one of the parties to the said construction contract, though alleged to have an interest in it, a share of the profits to result from it, and that said Ellicott furthermore had been called and examined on the part of said Dull as a witness before said arbitrators without disclosure of his interest; and upon the bill an injunction was granted *ex parte* by the said circuit court of Baltimore city, whereupon the cause, on the petition of said Dull, who is a citizen of the State of Pennsylvania, was removed to this court.

It is not shown that Ellicott was in the employ of the complainants, but that he was employed by the chief engineer and his salary paid by him, nor were any fiduciary relations existing between Ellicott and the complainants. The testimony given by him before the arbitrators they did not agree to, and there is nothing to show that the award and the judgment upon it were not just and right.
282 Under these circumstances it would not be equitable to set aside the award made by three of the most eminent engineers

the parties could find. It would serve no good purpose, for it must be that three equally qualified men would render the same award. The bill will be dismissed.

HUGH L. BOND,
Circuit Judge.

Decree. Filed 22nd of May, 1884.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL & Others.

This cause standing ready for hearing, the respective counsel of the parties were heard, and the bill, answers, exhibits, and testimony, and all the proceedings were read and carefully considered; and it appearing that the complainant is not entitled to the relief prayed in its bill—

It is thereupon, this 22nd day of May, 1884, by the circuit court of the United States for the district of Maryland, adjudged, ordered, and decreed that the injunction granted on the tenth day of February, 1879, in this cause by the circuit court of Baltimore city be, and the same is hereby, dissolved.

283 And it is further adjudged, ordered, and decreed that the bill of complaint of the complainant be, and the same is hereby, dismissed, and that the complainant do pay to the defendants their costs of this cause incurred in the said circuit court of Baltimore city and in this court.

HUGH L. BOND,
Circuit Judge.

Prayer of Appeal by Complainant and Order of Court Thereon. Filed 22nd May, 1884.

In the Circuit Court of the United States for the District of Maryland. In Equity.

THE UNION RAILROAD COMPANY OF BALTIMORE
vs.
JAMES J. DULL & Others.

To the honorable the judges of the circuit court of the United States for the district of Maryland, sitting in equity:

The Union Railroad Company of Baltimore, the complainant in the above-entitled cause, prays an appeal from the decree of the court passed in said cause on the 22nd day of May, 1884, and that the same may be allowed by the court.

CHARLES MARSHELL,
THOMAS W. HALL,
BERNARD CARTER,
Sol'rs for Compl't.

284 Ordered by this court, this 22nd day of May, 1884, that the appeal prayed by the complainant in the above cause be, and the same is hereby, allowed.

HUGH D. BOND,
Circuit Judge.

Motion and Order Transferring Funds from State Court. Filed 23rd May, 1884.

In the Circuit Court of Baltimore City.

THE UNION RAILROAD COMPANY OF BALTIMORE.
vs.
JAMES J. DULL & Others.

To the Honorable Wm. A. Fisher, judge:

The above-entitled cause having been removed to the circuit court of the United States for final adjudication the complainant moves the court to pass an order directing that the funds deposited by the complainant in this court as indemnity upon the granting of the injunction be withdrawn from the registry of this court and paid into the registry of the said circuit court of the United States for the district of Maryland to abide the decision in that court.

MARSHAL & HALL,
Sol'rs for Compl't.

285 Ordered by the circuit court of Baltimore city, this 19th day of May, 1884, on the foregoing petition, that the clerk of this court draw a check, payable to the order of the clerk of the circuit court of the United States for the district of Maryland, for the sum of $14,993.14, heretofore paid into this court by the complainant, and that he take the receipt of the said clerk of the circuit court of the United States for the district of Maryland for the same said receipt to show that the same is given by said clerk of the said circuit court pursuant to an order of said court authorizing said clerk to receive the same for the purposes set forth in said petition.

WILLIAM A. STEWART.

I, James R. Brewer, clerk of the circuit court of Baltimore city, do hereby certify that the above is a true copy of the original motion and order of court thereon, passed 19th May, 1884, and now on file in this office in the above-entitled cause; and I further certify that the costs in this cause have been paid by complainant, as follows:

Clerk's costs	$37 75
Cost of order of publication in Baltimore Daily News	30 00
Total	$67 75

In testimony whereof I hereto set my hand and affix the seal of the circuit court this nineteenth day of May, 1884.

[Seal Circuit Court of Baltimore City.]

JAMES R. BREWER, *Clerk.*

286 MEMORANDUM.—23d May, 1884, $14,993.14 paid into the registry of this court by the clerk of said circuit court of Baltimore city, and same deposited with the assistant treasurer of the United States at Baltimore to the credit of this cause.

Appeal Bond. Filed 30th May, 1884.

Know all men by these presents that the Union Railroad Company of Baltimore, a body corporate, duly incorporated under the laws of the State of Maryland, and Geo. Small and Charles Weber are held and firmly bound unto James J. Dull, Jacob C. Bamberger, John Ellicott, Samuel M. Shoemaker, the Canton Company of Baltimore, and the National Mechanics' Bank, and to each of them, severally, in the full and just sum of fifty thousand dollars, current money, to be paid to the said James J. Dull, Jacob C. Bamberger, John Ellicott, Samuel M. Shoemaker, the Canton Company of Baltimore, and the National Mechanics' Bank of Baltimore, and to each of them, severally, and to their certain attorney, executors, administrators, successors, or assigns, and to the attorney, executors, administrators, successors, or assigns of each of them severally; to the payment whereof, well and truly to be made and done,
287 we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with the corporate seal of the said The Union Railroad Company of Baltimore, and the seals of the said George Small and Charles Weber.

Dated this 29th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, in the circuit court of the United States for the fourth circuit in and for the district of Maryland, a decree was passed in a cause in said court wherein The Union Railroad Company of Baltimore was complainant and the said James J. Dull, Jacob C. Bamberger, John Ellicott, Samuel M. Shoemaker, The Canton Company of Baltimore, and The National Mechanics' Bank of Baltimore were defendants, in equity, in favor of the said defendants; from which said decree the said complainant has prayed an appeal to the Supreme Court of the United States, to be held at the city of Washington on the second Monday of October next, and it has been granted:

Now, the condition of the above obligation is such that if the above-bound The Union Railroad Company of Baltimore shall prosecute its said appeal with effect, and pay all costs and damages that may be awarded against it by the said Supreme Court in case it shall fail to make good its said plea, then this obligation shall be void; otherwise to be and remain in full force and virtue.

B. F. NEWCOMER, *Pres't.* [SEAL.]
GEO. SMALL. [SEAL.]
CHARLES WEBER. [SEAL.]

Signed, sealed, and delivered in the presence of—
JOHN S. LEIB.
E. H. GRAY.
CHAS. H. KOPPULONAY.

Endorsed: "Bond approved. Hugh L. Bond, circuit judge."

288 THE UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

To James J. Dull, Jacob C. Bamburger, John Ellicott, Samuel M. Shoemaker, the Canton Company of Baltimore, and the National Mechanics' Bank of Baltimore, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington on the second Monday of October next, pursuant to an appeal from a decree of the circuit court of the United States for the fourth circuit in and for the district of Maryland, in your favor, passed in a cause in said court, in equity, wherein The Union Railroad Company of Baltimore was complainant and you were defendants, to show cause, if any there be, why the said decree so as aforesaid passed should not be corrected and speedy justice done to the parties in this behalf.

Witness my hand and seal this 30th day of May, in the
289 year of our Lord one thousand eight hundred and eighty-four.

[The seal of the Circuit Court, Maryland.]

HUGH L. BOND, *C't Judge.*

Service of citation admitted on this 4th day of June, 1884.
A. W. MACHEN,
Sol'r for Def'ts, James J. Dull & John Ellicott & for J. C. Bamberger.

Service admitted on this 3rd day of July, 1884, as to the Canton Company of Baltimore.
ARCH'D H. TAYLOR, *Solicitor.*

Service admitted on this 8th day of July, 1884, as to the National Mechanics' Bank of Baltimore.
THEOS. B. HORWITZ, *Solicitor.*

290 [Endorsed:] 27. The Union Railroad Company of Baltimore *vs.* James J. Dull & others. Citation to the Supreme Court.

291 And thereupon it is ordered by the court here that a transcript of the record and proceedings aforesaid, with all things relating to the same, be transmitted to the Supreme Court of the United States to be held at the city of Washington on the second Monday of October next, and the same is transmited accordingly.
Test: JAS. W. CHEW, *Clerk.*

THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

I hereby certify that the foregoing is a true transcript of the record and proceedings of the circuit court of the United States for the fourth circuit, in and for the district of Maryland, in the said entitled cause.

In testimony whereof I hereto set my hand and affix the seal o the said circuit court on this 19th day of July, A. D. 1884.

[The seal of the Circuit Court, Maryland.

JAS. W. CHEW,
Clerk of said Circuit Court.

Endorsed on cover: Maryland. C. C. U. S. No. 346. The Union Railroad Company of Baltimore, appellant, *vs.* James J. Dull, Jacob C. Bamberger, John Ellicott, Samuel M. Shoemaker & Benjamin F. Newcomer, adm'rs *c. t. a.* of Samuel M. Shoemaker, deceased, The Canton Company of Baltimore, and The National Mechanics' Bank of Baltimore. Filed 6th October, 1884.

124-173

IN THE

Supreme Court of the United States,

October Term, 1887, *No.* 68

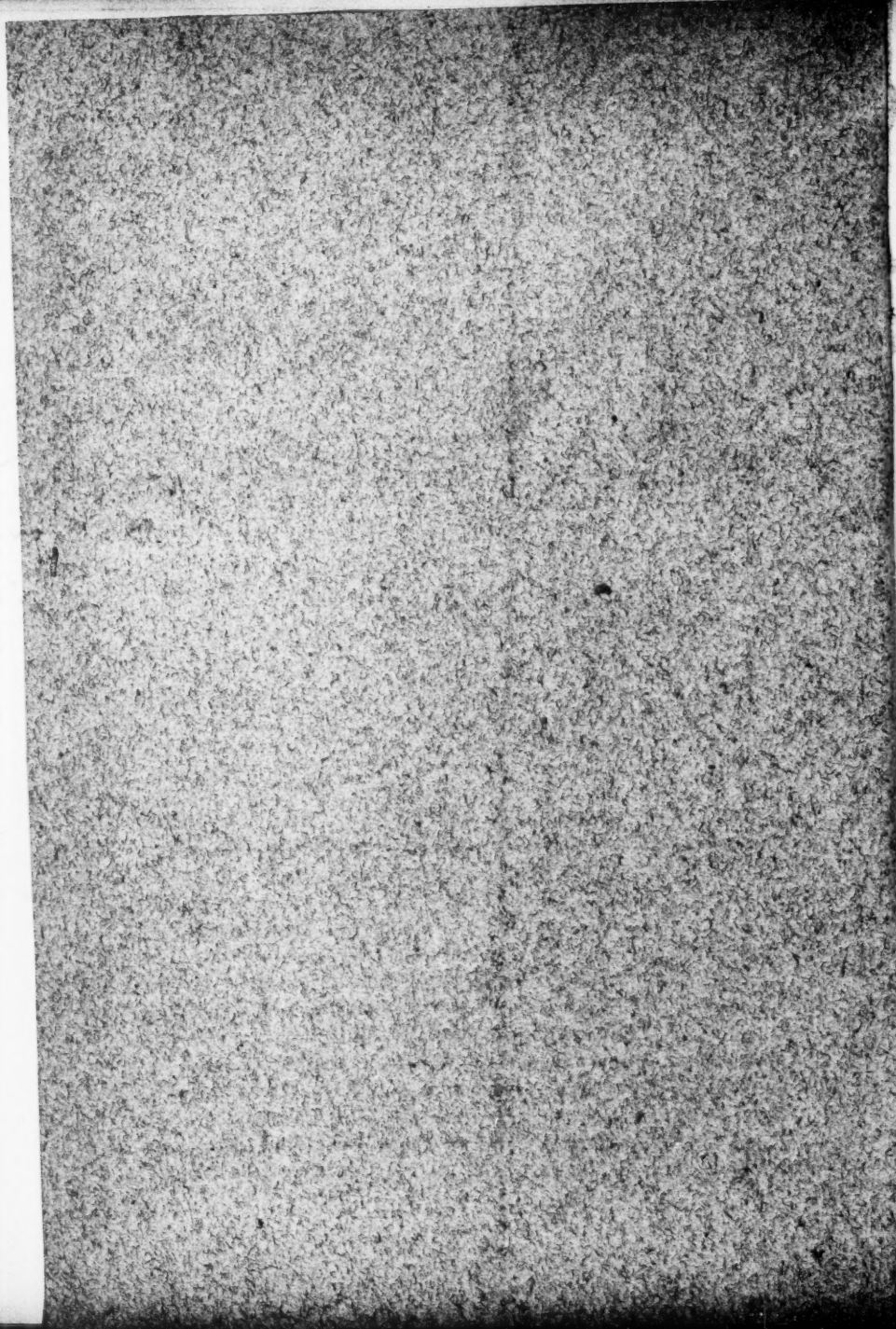
THE UNION RAILROAD COMPANY OF BALTIMORE,
APPELLANT,

vs.

JAMES J. DULL, AND OTHERS.

An Appeal from the Circuit Court of the United States for the District of Maryland.

THOMAS W. HALL,
CHARLES MARSHALL,
BERNARD CARTER,
WILLIAM A. FISHER,
Solicitors for the Appellant.



IN THE

Supreme Court of the United States,

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THE UNION RAILROAD COMPANY OF BALTIMORE,
APPELLANT,

vs.

JAMES J. DULL, AND OTHERS.

An Appeal from the Circuit Court of the United States for the District of Maryland.

The Bill of Complaint of the Appellant was filed in the Circuit Court of Baltimore City on the 10th day of February, A. D., 1879, and was thence removed, upon the application of the Defendants, Dull and Bamberger, into the Circuit Court of the United States for the District of Maryland.

The Bill of Complaint alleged that on the first day of May, A. D., 1871, the Complainant entered into a written contract, with full details, specifications and prices, with the Defendants, James J. Dull, William M. Wiley and R. Snowden Andrews, as co-partners, for the construction of a line of railway from a point near the Belvidere Bridge, to tide water at Canton in the City and County of Baltimore,

embracing a tunnel to be built by drifting; and that on the sixth day of July following a supplemental contract was entered into between the parties, by which the contractors were allowed to construct the tunnel by open cut, instead of by drifting, and certain other modifications were made; that Andrews retired from the contract, with the consent of the complainant, before the completion of the work provided for in it; that the work was completed by Dull and Wiley, and payments were from time to time made by the complainant, but that controversies arose between the contracting parties as to several matters connected with the contract and the compensation which ought to be paid to Dull and Wiley; that Wiley died while the controversies were pending, and that, suit having been instituted by Dull, as the surviving partner, against the complainant, Articles of Agreement were executed between the parties for the reference of this suit out of Court, under the Maryland law and practice, to three arbitrators, who awarded a sum of about $54,000 in favor of Dull against the complainant, although there was really no just claim against it, and judgment was entered by the Court in said suit upon the award.

The Bill then further alleged that when the specifications and other papers were prepared for the biddings for the work, the Chief Engineer of the complainant was Charles P. Manning, and the assistant Chief Engineer was John Ellicott, and that. by reason of engagements of Manning at the time in other railroad construction in the State of Ohio, the preliminary arrangements for bidding, the interviews with the bidders, and the general superintendence of the work for some months from its commencement were left in charge of said Ellicott almost entirely, and that he then possessed fully the confidence of the complainant and Mr. Manning; that upon the examination before the arbitrators Ellicott was examined on behalf of the latter, Dull being represented to be the sole surviving contractor, and Ellicott was presented as a disinterested witness and testified to pre-ended changes made in the plans after the making of the

contract; that, after the entry of the judgment on the award, some portion of it was paid in cash, and notes of the complainant were given for the balance, the payment whereof was guaranteed by the Canton Company, of Baltimore; that about three months before the filing of the Bill of Complaint a suit was tried in one of the Courts in the City of Philadelphia between Milo Locke, formerly an employee of Dull & Wiley, and the executor of Wiley, in the course of which Dull was examined as a witness, and, upon his cross-examination, he admitted that there were two other parties secretly interested in the said contracts, together with Dull & Wiley, one of them being Samuel M. Shoemaker of Baltimore, since deceased, and the other the said John Ellicott, and that the nature of this evidence was communicated to the complainant by a person who was then present in the Court room, and was the first intelligence which the complainant received of the fraud perpetrated upon it in the corruption of its Engineer; that it has since learned that at least eighteen thousand dollars was paid by Dull and Wiley to Ellicott, as much as ten thousand dollars having been paid at one time. The bill averred that the original and supplemental contracts for the construction, as well as the contract for the reference were procured from it by the fraud and deceit of Ellicott, Dull and Wiley with the knowledge of Shoemaker, that the award was based upon the contracts, and were also procured by the fraud and deceit of Ellicott, Dull and Wiley.

The prayer of the Bill was that all the contracts and the award and judgment might be declared void and set aside, and that the parties might be enjoined from collecting the unpaid notes, and compelled to make restitution of the sums which had been paid to them under the judgment. (pp. 2-8 of the Record.) Copies of the original and supplemental construction contracts and specifications, and the contracts for the arbitration were filed as Exhibits with the Bill. (Record pp. 15–30.)

Answers were filed by the Defendants, Dull, Shoemaker and Ellicott, which are substantially the same. They assert that the claims of the contractors were well founded and and that the award was a just one; they deny that Ellicot was in the employment of the complainant, or received his compensation from it, and aver was employed by Manning as his assistant, and was paid out of his salary; that the contracts and specifications were all submitted to and approved by Manning, and that Ellicott acted in good faith, for the advantage only of the Plaintiff; that he did not favor Dull and Wiley in any respect and had no opportunity for doing so; that he had no agency in giving out the bids, and had nothing to do with the superintendence of the work of construction subsequently. The answers admitted that Ellicott had received thirteen thousand six hundred and ninety-eight dollars and fourteen cents, and the explanation given was that it was an unsolicited gift from Samuel M. Shoemaker to him of an interest to the extent of one-sixth, in the profits of the contract, and that Shoemaker had been originally offered a one-third interest in the contract, being expected to contribute his proportion of cash necessary for the operations, but had asked to have his share reduced to one-sixth, in order that the other sixth might be presented to Ellicott.

(Answer of Ellicott, Record pp. 37–42.)
(Answer of Shoemaker, Record pp. 43–48.)
(Answer of Dull, Record pp. 54–64.)

The only grounds assigned by the Judge of the Circuit Court for the dismissal of the Bill appear in the following citations from the opinion filed by him:

"It is not shown that Ellicott was in the employ of the Complainant, but that he was employed by the Chief Engineer, and his salary paid by him, nor were any fiduciary relations existing between Ellicott and the Complainant. The testimony given by him before the arbitrators they did not agree to, and there is nothing to show that the award

and judgment upon were not just and right. Under these circumstances it would not be equitable to set aside the award made by three of the most eminent engineers the parties could find. It would serve no good purpose, for it must be that three equally qualified men would render the same award."

(Record pp. 155-156.)

The appellant respectfully assigns the following as errors in the decree of the Circuit Court aforesaid, for which the same should be reversed.

1st. That the evidence fully established each of the propositions, that the Defendant Ellicott was in the employment of the appellant, the Union Railroad Company of Baltimore, and that fiduciary relations existed between him and the appellant.

2nd. That even if Ellicott was employed by the Chief Engineer of the appellant directly, instead of being employed by the appellant itself, he was paid directly out of the treasury of the appellant and employed by its consent to take the place of the Chief Engineer, during the absence of the latter, and his relations to the appellant were of such a nature that any contract on behalf of the appellant in the making of which, or in the preliminaries for which, or in connection with which in any respect he acted for the appellant would be fraudulent and voidable at the option of the appellant, if he had a secret interest in the fruits of the contract, procured before, at the time of, or after the making of the contract, and while his relations to the appellant continued.

3rd. That the merits of the award of the arbitrators, and the question whether the same was just and right are immaterial, and it was not incumbent upon the appellant to offer any proof upon this subject, as the contract under which the award was made and the rights of the parties were ascertained by the arbitrators was in fact fraudulent and voidable as stated in the preceding assignment of errors.

If the rights established by the award grew out of the contract, they must fall with it, even if it were true that the arbitrators properly interpreted and applied the contract.

4th. That the effect of the testimony of Ellicott upon the minds of the arbitrators was immaterial, the contract having been fraudulent, and it is impossible to say what would have been the effect upon their minds, if the fact of his interest had been then disclosed.

It is respectfully submitted that as to the matter-of-fact upon which the learned Judge of the Circuit Court based his decree he fell into an error, and that the relation between Ellicott and the complainant was of such a nature that it was entitled to the benefit of his unbiased and uncorrupted judgment.

He was engaged in the service of the company as early as December, 1870, and was then practically in sole charge, and remained in the service until September, 1871, some months after the letting of the contracts.

(Evidence of Wrenshall, pp. 87-98.)

(Evidence of Kenly, pp. 96-97, 1st and 2nd Cross-questions, p. 100.)

(*Note.*—An error has occurred in the record, Mr. Kenly having entered the service in 1871, and not 1881, and having so testified. The dates of his estimates also correct the error.)

Ellicott received the payment of his salary directly from the treasury of the complainant, occupied their Engineer's office, was recognized as the "Engineer in Charge" of the work and so described himself always until the return of Mr. Manning from Ohio, about May, 1871, when he described himself as "Associate Engineer." (See the various Exhibits on pp. 115-123.) He was in fact the responsible Chief Engineer during the absence of his associate, Mr. Manning. His relation to the Company was of the same fiduciary na-

ture, whether his employment was directly by the appellant or by Mr. Manning.

Mr. Shoemaker was examined as a witness by the complainant, and the examination is worthy of attention, since the nature of his answers, with his denials and retractions, lays bare the motives of the parties to the nefarious transaction in controversy. He denied at first that he had paid any part of the capital for conducting the work, and stated that his only transaction of that kind was a loan made to Wiley and returned by him. Being compelled to do so, he afterwards reluctantly produced his check book and was then obliged to admit that he did pay to Wiley eight thousand three hundred and thirty-three dollars and thirty-three cents on the 28th day of June, 1871, as his part of the capital for the conduct of the work under the contract. (Record, 35th–38th Ans. pp. 79–80, 54th Ans. p. 81 and Ans. 61 and 62 p. 82.)

He not only denied that he had paid his proportion of the capital, but he asserted that he had no right to any part of the profits and treated the payments to him as a gratuity from Mr. Wiley. (37th Ans. p. 79.) He admitted, however, that he had already received, at the time the Bill was filed, thirteen thousand five hundred and fifty dollars and fifty-three cents. (Record pp. 82–3.)

Mr. Shoemaker's account of the manner in which he acquired his interest is remarkable. He states that Wiley voluntarily proposed that he should accept an interest of one-third in the profits, and that he then told Wiley that he did not wish more than one-sixth, and that he gave to Wiley the other one-sixth "to do as he chose with it," and that he thought that it was "given" to John Ellicott, though he did not know certainly. (Record, Ans. 37–40, pp. 79–80. Ans. 55–60, pp. 81–82. Ans. 73–86, pp. 83–84.) The motive of Wiley for offering him one-third of his profits was, in his opinion, that he might puff Wiley by speaking well of him, though he would have done so in any event. (pp. 81–82.)

In the answer following the one above alluded to, he claimed to be himself the donor of the "gift" to Ellicott. (81 Ans. p. 84.)

The reason assigned for the alleged gift from him to Ellicott was as remarkable as his explanation of his own relation to Dull & Wiley; it was because Ellicott was extremely poor, and in immediate need of money. It was a gift not calculated to relieve any immediate necessities of Ellicott, since it was uncertain, in his opinion, whether any profits would ever result, and it was certain that no returns could be had for a considerable period. In fact the first payment received by Shoemaker himself was two years afterwards.

No other gift, even of a trifling character had ever been made by Shoemaker to Ellicott. (Shoemaker's testimony, Question 91–86, p. 84.) Mr. Shoemaker being a copartner in the enterprise with Dull & Wiley, and Wiley at least if not Dull also, having been apprised from the beginning of the scheme to interest Ellicott, the rights of the appellant are the same whether the gift to him was made by Shoemaker or by all of them.

But the statement that the gift was made by Shoemaker alone is a subterfuge.

Col. R. S. Andrews was one of the three ostensible contractors originally and afterwards retired. The arrangement between him and Dull and Wiley was at first that they should be equally interested, but he was afterwards informed by Wiley that Shoemaker had a rightful claim to an interest, and he was obliged reluctantly to submit to the reduction of his share to one-sixth.

The arrangement then made between him and Dull and Wiley was that each of them was to have one-third interest in the profits and he was to receive one-sixth; that the capital to be contributed should be fifty thousand dollars, of which he should furnish one-sixth part, which he accordingly did.

We have already shown that Shoemaker furnished only one-sixth of the capital in correspondence with his interest

in the profits. *Ellicott furnished no money, and therefore Dull and Wiley not only gave Ellicott his sixth interest in the profits, but paid in his proportion of the working capital, without any contribution from Shoemaker whatever.*

(Andrews' Ev. pp. 109 to 111.)

The payments were made by Wiley directly to Ellicott.

Such was the secresy accompanying the gift, that it was concealed not only from the complainant, but from Col. Andrews.

(Andrews' Ev. 16th Ans. pp. 111 and 112.)

Even Mr. Dull undertook by his answer, to disavow knowledge of the connection of Ellicott with the contract until after the making of the supplemental contract in July, 1871, though he did not venture to offer himself as a witness.

(Dull's Ans. pp. 60.)

It was concealed from the arbitrators and Ellicott himself was examined against the complainant. (Whitcomb's Ev. 7th Q. pp. 132, and 4th X-Q. pp. 133.)

The transaction has all the badges of fraud. It was not only secret in its inception, but the payments to Ellicott were carefully made in a mode to baffle detection. Payments were made to him in large amounts, the first being eight hundred dollars, the second two thousand dollars and afterwards a larger sum (apparently about nine thousand dollars), and yet all payments were in currency, the largest being paid at a hotel in Baltimore, and none at Dull and Wiley's office. No checks were drawn to his order by Dull and Wiley, or otherwise identified as being for money paid to him, except that there appeared on the stub of one check as a tell-tale memorandum, the letters "J. E.," in pencil. This check book had been obtained by Locke, the same subcontractor whose controversy with and suit against the Executor of Wiley brought to light the transaction in controversy, and was slipped by him from behind the counter of a restaurant and exhibited to Ellicott.

No accounts were furnished, and neither Shoemaker nor Ellicott sought to investigate the books or test the amount of the earnings in any manner and no receipts were given by Ellicott.

(Shoemaker's 37th Ans. p. 79.)
(Ellicott's Cross-Examination, p. 140–142.)

We will endeavor to show hereafter that it is unimportant whether Ellicott's interest in the profits of the contract commenced at the time the contract was executed, or arose subsequently, before his connection with the service of the appellant had ceased.

It is admitted that it commenced before his connection with the complainant was terminated, but there has been an effort to postpone it until after the making of the supplemental contract.

Mr. Dull asserted that he never heard of it until after the making of the supplemental contract of July, 1871, and that the arrangement with Ellicott was made "some time after" his own arrangement in regard to his share.

(Dull's Ans. p. 60.)

Ellicott asserted in his answer that it commenced "some time after the letting."

(Ellicott's Ans. p. 40.)
(Shoemaker's Ans. p. 44.)

The reason why the effort has been made to postpone the inception of Ellicott's interest to as late a period as possible, and especially to place it after the execution of the supplemental contract, is obvious enough, upon a careful review of the evidence.

Dull and Wiley were able to make a favorable bid, placing their biddings for driftings at low figures, and their offer for open cuttings, of which the quantity was small under the original contract, at high prices. The contract

having been procured, the supplemental agreement was afterwards obtained, by which the work was altered from drift to open cutting, and the price of the latter increased. The profits were so large as to enable them to give away one-sixth, and, upon a working capital of fifty thousand dollars to distribute seventy-six thousand four hundred dollars, exclusive of the fifty-four thousand one hundred and fifty-nine dollars and fifty cents for which the award has been made, being more, exclusive of the award, than 150 per centum of profit, and, inclusive of it, more than 250 per centum upon the cash capital contributed.

If the defence depends upon the time at which the corrupt agreement was made, it is the duty of the defendants to prove it, especially as the facts are entirely within their knowledge. But the testimony demonstrates that Ellicott's interest, if not coincident with the execution of the contract, preceded the supplemental contract of July, though the defendants have carefully refrained from introducing any proof of the exact date of the arrangement.

The testimony of Col. Andrews (8th, 9th and 10th Ans. pp. 110–111), proves that Shoemaker's interest was the result of a claim made by Shoemaker, and not, as he stated, a voluntary offer by Wiley.

Ellicott was a stranger to Dull and Wiley, but intimate with Shoemaker, through whom it was convenient to reach him.

(Ellicott's Evidence, 8th Ans. pp ~~142~~ 134

Shoemaker's claim, which, under the evidence, appears to rest upon nothing unless it be this procurement of Ellicott, was made *before* the written articles were executed by Andrews, and these articles were signed only a few days after the award of the contract, which occurred in the latter part of April, 1871.

(Andrews Ev. 8th Q. p. 110. 5th and sixth X-Q. p. 112).

The proposition to include Ellicott was coincident with the offer to Shoemaker.

(Shoemaker's Evidence, 79th Q. p. 84).
(Shoemaker's Evidence, 94th Q. p. 85).

Mr. Shoemaker admitted that the offer of the interest was made in May or June, 1871, and as early as June 28th, 1871, he had paid in all his contribution to the capital.

(Shoemaker's Ev. 42nd Q. p. 80. 61st and 64th Q. p. 82.)

Mr. Shoemaker mentioned to Ellicott, Wiley's "promise" to him, and told Ellicott that "if anything came of it," Ellicott should have his share.

(Shoemaker's Ev. 94th Q. and Ans. p. 85.)

It had ceased to be a promise and was a consummated agreement at least, as early as June 28th, 1871, when Shoemaker's payment was made.

The law applicable to such a state of facts does not admit of question. The appellant will maintain as follows:

1.

Contracts, to which officers or trusted employees of corporations are parties in their own behalf, are ordinarily not enforceable; but when the connection of such officers or employees with them has been concealed they are void to all intents and purposes, if the Company elects so to treat them, *without any inquiry whether the company has been in fact injured*, and no rights can be maintained by the guilty parties under them.

4 Howard, 503, 533, Michaud vs. Giraud.
Story on Agency, Secs. 210, 211 and notes.
Munson vs. Syracuse R. W. Co., 103, New York 58.
1 MacQueen, 461, Blaikie vs. Aberdeen R. W. Co.
3 Beaven, 78, 84, Gillett vs. Peppercorn.
59 Maine, 277, 281, European and N. Amer. R. W. Co. vs. Poor.

21 Kansas, 398, Ryan vs. L. A. &c. R. R.
14 Mich. 487–8, Flint, &c., R. W. vs. Dewey.
L. R. 10 *Chan. Appeals*, 515, 520–4, 525, *&c.*
Panama, &c. Co. vs. Telegraph Works Co.
L. R. 3 Queen's Bench Div., 549, Harrington vs. Victoria Graving Dock Co.
5 Central Law Journal, 527, Wardell vs. Union Pac. R. R. Co.
103 U. S., ~~835~~, S. C. p. 651
109 U. S. 522, Mounds vs. Brownsville, R. R. Co.

2.

Ellicott's clandestine interest in the profits of the contract introduced an element fatal to its existence, whether the interest began with the contract, or arose afterwards.

14 Mich. 487–8.
21 Kansas, 398.
L. R. 10 Ch. Appeals, 526–528, and Vice-Chancellor Malin's judgment pp. 521–2, in the note.

3.

The question as to how far a Court of Equity will relieve against a fraudulent contract after it has been executed, and where the parties cannot be restored to their former condition, does not arise in this case.

If that question be considered material, we respectfully refer the Court to the following authorities bearing upon it.

93 U. S., p. 62, Grymes vs. Saunders.
61 N. Y., p. 153, Hammond vs. Penrod.

But this is an attempt on the part of the Defendants to recover money claimed to be due to them under a fraudulent contract.

The amount of the judgment in this case sought to be vacated, was ascertained and measured by the terms of a contract made by the Plaintiff through its Engineer who was secretly in the pay of the Defendants.

That Engineer under his agreement, has already received a part of the sum awarded by the arbitrators, and is yet entitled to one-sixth of the balance of the judgment.

If the Court permits the judgment to stand and be enforced, part of it, one-sixth, will go to complete the payment of the bribe promised to the Engineer.

We only claim that the rights of the defendants for the work done by them and accepted by the Company, shall not be ascertained or measured by a resort to the fraudulent contract.

If the judgment be vacated, their suit against the Company still stands, and they can recover whatever they can show themselves to be entitled to, but not under the contracts.

Or this case may be sent back to the Circuit Court to ascertain the actual value of the work done by the defendants, charging them with the amount they have received, and to enter a decree according to the result of such an account.

When the contracts of May and July, 1871, shall have been declared void, and the judgment based upon them shall have been vacated, the parties will stand as if the work had been done without any contract, and the Defendants can recover accordingly.

Such was the course adopted by his Honor Judge Miller in the case of Wardell vs. Union Pacific Railroad Company, (5 Central Law Journal, p. 529,) and it received the sanction of this Court upon appeal, 103 U. S., p. 655. See also Thomas vs. Brownville R. R. Co., 109 U. S., p. 522.

4.

The concealment and deception practised upon the appellant vitiates the award. The recitals in the submission were false, and calculated to mislead. Good faith and fair dealing required that the facts should be disclosed to the appellant. Their concealment not only induced the appellant to consent to the arbitration, when it never would have

done so, if it had been apprised of the truth, but it placed both Shoemaker and Ellicott in a position to have intercourse with the arbitrators, who would have regarded them as disinterested persons, and the evidence can leave no doubt that they would have neglected no opportunities open to them.

13 Peters, 36, Smith vs. Richards.

5.

The circumstances which rendered the contracts void were concealed from the complainant until after the judgment had been obtained.

In such a case, a Court of Equity ought to grant relief and enjoin the Defendants, even after the judgment at law and enable the appellant to plead anew to the action at law, if this is to be allowed to stand.

2 Story's Eq. Secs. 887, 894.

7 Cranch, 332, 333, Marine Ins. Co. vs. Hodgson.

17 How. 445, Hendrickson vs. Hinkley.

94 U. S. 653, Crim vs. Handley.

13 Peters, 36, Smith vs. Richards.

Although the declaration in the suit in the Baltimore City Court contained only the common counts, the action was in fact upon the contract, and the arbitration and award were based entirely upon it. See the Agreement for arbitration, pp. 15–18.)

Indeed twenty thousand dollars of the amount awarded was obtained by means of the interpretation placed upon the words in the contract, "Haul for all material excavated, for each hundred feet hauled per cubic yard 1¼ cents."

The open cut was sixty feet in depth and machinery was used to elevate the material excavated, and allowance was made by the complainants' president Engineer, Mr. Kenly, for the actual distance traversed, but claim was made and sustained that in lieu of this allowance the contractors

should receive approximate compensation for the distance which would have been traversed by hauling with carts. Evidence of Kenly, p. 107, and Cross-Examination p. 104–5. (Whitcomb's Ev. 5th Q. p. 133.)

Ellicott himself supplied the material for the contract, and furnished the expressions upon which this deceitful claim was founded.

(Evidence of Mr. Kenly, 4th Q. p. 97.)

The whole proceedings, the suit at law and the arbitration, were entirely for the purpose of enforcing the void contract.

THOMAS W. HALL,
CHARLES MARSHALL,
BERNARD CARTER,
WILLIAM A. FISHER,
Solicitors for the Appellant.

24-173

NOV 8 1887

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 68. OCTOBER TERM, 1887.

THE UNION RAILROAD COMPANY OF BALTIMORE,

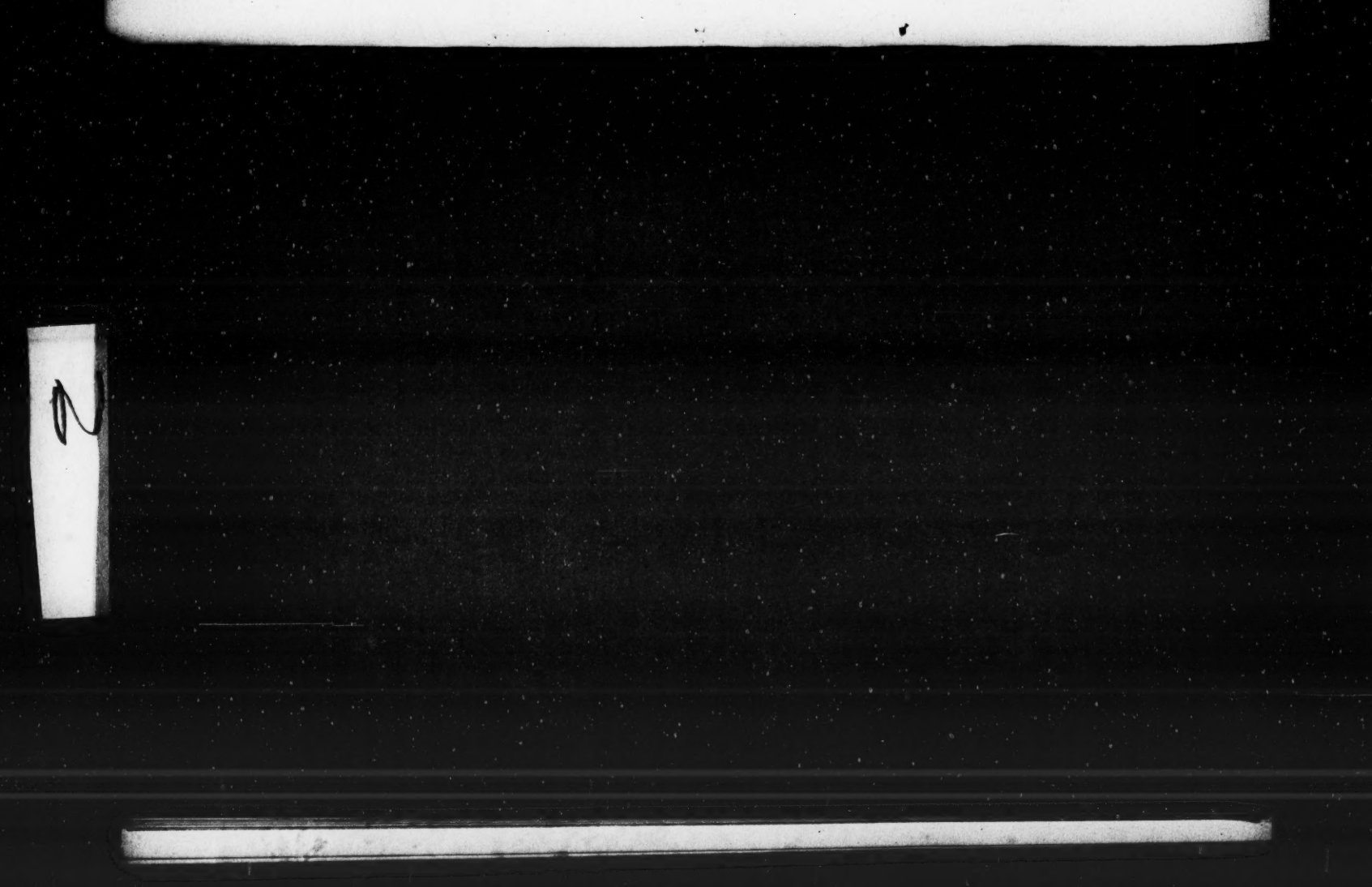
Appellant,

vs.

JAMES J. DULL, ET AL.

BRIEF FOR APPELLEES.

I. NEVETT STEELE,
ARTHUR W. MACHEN,
Solicitors for Appellees.



IN THE

SUPREME COURT OF THE UNITED STATES.

No. 68. OCTOBER TERM, 1887.

THE UNION RAILROAD COMPANY OF BALTIMORE,

Appellant,

vs.

JAMES J. DULL, ET AL.

BRIEF FOR APPELLEES.

These facts are beyond dispute:

On the 16th of March, 1871, the Union Railroad Company advertised for proposals for the graduation and masonry of a section of its railroad, including a tunnel, to be constructed under Hoffman street. There were sixty bidders. The lowest bid was that of Dull and Wiley, a firm consisting of James J. Dull and William M. Wiley. When the contract was awarded, R. Snowden Andrews, another bidder, was, with the consent of the Railroad Company, admitted as a co-contractor. A contract was executed, dated May 1st, 1871, by which Dull, Wiley and Andrews undertook to do the work according to the terms of the said lowest bid.

Owing to a change of plan on the part of the Railroad Company, and the determination to do a larger proportion of the work by open-cut excavation than was originally contemplated, a supplemental agreement was entered into, dated the 6th day of July, 1871, which substituted open or thorough cut for drifting, and provided for an increased compensation for open-cut excavations; the contractors, on their part, agreeing to indemnify the company against claims for damage to houses and contents from the construction of the said open cut or tunnel.

Under the contract as so supplemented the work was fully performed, "in a most thorough and workmanlike manner," and was accepted and made use of by the Appellant. It was completed in March, 1873. Some six or eight months before this, Col. Andrews, with the consent of the Railroad Company, assigned his interest to Dull and Wiley, who thus became the sole contracting parties of the first part. At the end, several questions arose between the contractors and the Railroad Company, which delayed the settlement of accounts.

The balance due to the contractors according to the accounts furnished by the Company was $28,630.98. In addition, the contractors claimed several allowances which the Company was not willing to recognize.

One question, which had given rise to some feeling between the contractors and the company's engineers, was as to where the responsibility lay for the falling down of some of the brick arch of the tunnel. Both the building and falling down of this portion of the arch had taken place in the year 1872, and while the rest of the work was in progress. It was rebuilt by the contractors, who demanded compensation for the cost of the rebuilding, claiming that the accident was due to no defect of masonry but to engineering errors.

Another item of claim grew out of the fact that the contractors had, at a considerable cost to themselves, introduced several hoisting machines, by which material was lifted to the surface, expediting the work, and saving much cartage which the Company would otherwise have had to pay for.

Some stone, the property of the contractors, and not required in the construction of the tunnel, was broken up by the Railroad Company and made use of as ballast.

There had been a shrinkage of replaced earth, which the engineer had not taken into account.

Certain masonry was claimed by the contractors to have been wrongly classed by the engineer.

Other matters of claim existed, but the above are all which the Arbitrators recognized or allowed for—excepting Interest.

Pending negotiations for a reference of matters in dispute to arbitration, William M. Wiley died.

A suit of James J. Dull, as surviving partner, against the Railroad Company, was docketed in the Baltimore City Court on the 10th of July, 1875.

On the 20th of December, 1875, an agreement in writing for the arbitration of the matters in controversy between the parties was entered into, under one of the provisions of which the pending action in the Baltimore City Court was, by rule of Court, referred to the arbitrators, to the end that judgment should be entered on the award. The arbitrators selected were Henry Tyson, nominated by the contractors, Robert K. Martin, nominated by the Railroad Company, and H. D. Whitcomb, who was chosen by the two former. They were all civil engineers of large experience and high reputation.

Upon the wording of the supplemental agreement, in the clause providing for the contractors' responsibility for damage to *houses and contents*—"from the construction of the said open cut or tunnel"—which as the Company claimed made the contractors liable for such kind of damage to property adjacent to that part of the tunnel where the work was done by drifting or boring, as well as to the open or thorough cut part, while the contractors claimed that they had not entered into such a comprehensive obligation, and could not reasonably be supposed to have done so, as damage over *drift* came from the existence of the tunnel itself, and could not be prevented by any of the measures of shoring or propping of the sides of the excavation provided for in the agreement. This question, however, of the construction of the supplemental

agreement, the Railroad Company would not consent to leave to the three engineer arbitrators, and required that it should be left to the determination of a lawyer. Accordingly it was so separated from the other questions, and submitted to a legal gentleman, who adopted the literal construction of the word "tunnel" in the agreement contended for by the Railroad Company, and his conclusion, operating hardly as it did, and subjecting the contractors to a liability of many thousand dollars beyond their contemplation when they signed the supplemental agreement prepared by the Engineer of the Company, was acquiesced in by them, and the award of the arbitrators made in conformity with it.

After a very full and patient hearing and thorough examination of the case, occupying a period of several weeks' duration, the arbitrators, Messrs. Tyson, Martin and Whitcomb, unanimously ascertained that the total amount due the contractors for the work done and interest was $73,240.70, deducting from which the sum of $19,081.50, the amount of the damages to "houses and contents," the balance was $54,159.20, and for this they rendered their award in favor of the Plaintiff, James J. Dull.

The award was returned into the Baltimore City Court, and, after the lapse of the requisite period, during which no exceptions were filed by either party, Judgment was duly entered upon it on the 11th of January 1877, for the said sum of $54,159.20, with interest from the date of judgment and costs.

The Union Railroad Company was represented to be at that time without money to satisfy the judgment, and the Canton Company, being unwilllng to have execution issue, requested the forbearance of the Plaintiff, and proposed, in case of a certain stay being conceded, to guaranty the payment of the debt by instalments. This offer was accepted by Mr. Dull. A cash payment was made, and for the balance the notes of the Union Railroad Company were given, the payment of which the Canton Company guaranteed. By this means execution was averted, and the Canton Company and the Appellant gained all the time they asked for. Two of the stipula-

ted instalments only were paid, and on the day before the maturity of the third one, the present bill was filed and an *ex parte* injunction obtained from the State Court of Equity, at Baltimore.

It is not disputed that all the work of the construction of the tunnel was performed, and that the Appellant has enjoyed the full use and benefit of it ever since its completion in March, 1873. While the Bill alleges that the award was unjust, it does not attempt to show in what respect it was so, unless this is supposed to be done by the allegation that the claim of the Contractors was "largely based" on the ground that "they had contracted with reference to a certain model for the tunnel presented to them by John Ellicott, the acting chief assistant engineer of the company, and that a change to their disadvantage was afterwards made," coupled with the allegation "that the said Ellicott was presented and sworn before the arbitrators as a disinterested witness on behalf of the said Dull, and upon this testimony mainly, if not entirely, the said arbitrators allowed the pretended claim of the said Dull based upon an allegation of the change in the model for the construction of the said tunnel, and also other of the claims made by the said Dull, to which change said Ellicott testified, although in fact no change was made of [after] the execution of said contract."

But the proof shows that the award was in no respect founded upon the change of model or plan in question, and it also shows that the said change of model was the *only* matter with reference to which Ellicott testified before the arbitrators, and that his testimony, therefore, was wholly without influence.

The evidence on this point is conclusive. At the hearing before the arbitrators a Bill of Particulars was presented by the plaintiff's counsel, a copy being given to each arbitrator; and upon the copy of Mr. Tyson, who acted as a chairman or secretary to the board, the conclusions of the arbitrators as to each item were noted in ink, and a statement subjoined showing precisely how the aggregate amount was reached, This

copy, with the handwriting and figures of Mr. Tyson upon it, is in evidence, Exhibit J. J. D., printed Record, page 64. The effort to indicate in print the changes made in the handwriting of Mr. Tyson has not been very successful; and as the the character and contents of the paper best appear by inspection of the *original*, it has been produced here under the 8th Rule. It is manifest from it that the award was given altogether upon items with regard to which Mr. Ellicott was *not* examined. It further appears that the actual grounds of the award are (1) the accounts furnished by the Railroad Company, based on the measurements of its engineers, Manning and Kenly, shown in the last monthly estimate, No. 23, for March, 1873, with the small addition for work done in April of that year; (2) the value of certain stone used by the Railroad Company for ballast; (3) excavation of earth to replace certain shrinkage (not taken into account in engineers' measurements,) with the haul of the same; (4) cost of reconstructing break in arch of tunnel—the original construction and downfall of which occurred in 1872 or 1873 (testimony of Kenly, Pr. Record, p. 106); (5) replacing other shrinkage over tunnel, and haul of this. These are *all*. The balance of the total sum awarded is interest.

Mr. Tyson having died before this suit, his testimony could not be obtained, but Mr. Whitcomb was examined, and not only proved this memorandum of Mr. Tyson, but produced his own independent memorandum, to the same effect, made upon his own copy of the bill of particulars. Testimony of Whitcomb, p. 131, Exhibit H. D. W. (T. D. W. No. 2 in printed Record,) printed Record, p. 144.

It is thus perfectly certain that all of the questions upon which the award is founded arise out of transactions long subsequent to Mr. Ellicott's connection with the Union Railroad Company. If, therefore, he had testified with respect to any of those matters, his testimony would have stood like that of any other competent witness produced subject to cross-examination. But it is further in proof—uncontradicted—that he was not examined as to any of these items of the claim, but

only as to a matter of fact relating to another item which the arbitrators wholly disallowed.

Mr. Ellicott's testimony on this point is explicit: (Pr. Record 141.) Mr. Whitcomb's is as clear as it could be expected to be upon such a matter after the lapse of several years. (Pr. Record, 132.) Mr. Kenly, the appellant's witness, when asked by its counsel, upon what Mr. Ellicott was examined, and what testimony he gave, Pr. Record, p. 99, Q. 29, answered that he testified in regard to the plans shown the contractors at the letting, and that they differed from those by which they were required to do the work. Afterwards, when pressed by the same counsel to say whether Ellicott was not also examined on the haul question, he answered that his mind was not clear, that he *thought* he gave testimony as an "expert" on that question—but added "I am not clear on that." On cross-examination, p. 104, X-Q. 46, he further said "I am not certain by any means that he testified on that subject." To remove a possible doubt upon the point, it was deemed proper to call one of the *counsel*, who had represented the contractor at the Arbitration, to prove what subject Mr. Ellicott was examined upon, and that he was not examined with regard to the haul. (Pr. Record, p. 143.) As the counsel of the Railroad Company, whose memory, or notes, would have corrected this statement, if erroneous, did not testify, and as Mr. Martin, the other arbitrator, the nominee of the Railroad Company, was not called, it is presumed that it must be conceded to be sufficiently proved that the award was not founded in any degree upon any testimony given by Mr. Ellicott.

Where the case of the complainant was based to so great an extent as the bill shows it to have been upon the two alleged facts, first, that the contractors' claim before the arbitrators was "largely based" upon a supposed change of plan from the drawings exhibited before the letting of the work, and, second, that the allowance of the said claim was made upon Mr. Ellicott's testimony, it was incumbent on the Appellant to substantiate *both* of these allegations by proof. But not only has the appellant failed to furnish such proof, but the appellees have produced conclusive evidence that the change

of model, whether a fact or not, is wholly immaterial in the case, the award having proceeded on other grounds.

Apart from all other defences, it would seem, therefore, to be a sufficient answer to the pretensions of the appellant, that the case set up in the Bill has broken down upon the proofs.

A statement made on pages 10 and 11 of the Appellant's brief is so erroneous as to call for correction; although, as the matter was not set up in the bill, and was not presented in any manner to the notice of the Circuit Court, it could not be availed of here as ground for reversal. The representation in the brief is that Dull and Wiley "placed their biddings for driftings at low figures, and their offer for open cuttings, of which the quantity was small under the original contract, at high prices: the contract having been procured, the supplemental agreement was afterwards obtained, by which the work was altered from drift to open cutting, and the profits were so large, &c." Now that means, if anything, that Dull, Wiley & Andrews procured the supplemental agreement, and did it to take advantage of rates for open cutting fixed in the original contract. But, besides the injustice to the contractors of attributing to them the making of the supplemental agreement of July 6, 1871, an instrument prepared by the Appellant's officers or counsel, and, as drawn by them, containing an equivocal phrase as to the responsibility for damages to houses and contents from drifting, probably unintentional on the part of the draughtsman, but of which the Company did not scruple ultimately to take advantage, the idea that the contractors are responsible for the Company's change of purpose as to the mode in which the greater part of the tunnel was to be made —the substitution of open cut for drift—is refuted by the recitals of the agreement itself, an instrument in the preparation of which Ellicott is conceded to have had no part. The point made in Appellant's brief is an after thought of counsel. How little foundation it has in fact, is apparent upon a comparison of the two agreements of 1st May and 6th July, 1871. The contract of 1st May, in accordance with Dull & Wiley's

bid, provided for drifting at the rate of $5 per cubic yard, and for open cut excavation, other than solid rock, at 60 cents per cubic yard. In the supplemental agreement, the Railroad Company agreed to pay 15 cents *additional* for open cut—not the same rate, as the appellant's brief put it; that is to say, they were to receive 75 cents instead of 60 cents. On their side, the contractors undertook to shore up the sides, or take other precautions, and be responsible for all damages to houses and contents—as they naturally supposed, to houses and contents where such precautions were required, that is, along the open cut, but, as the Company held them bound, for all damages of that nature anywhere along the line of the entire tunnel. If there was any unfair advantage taken in the supplemental agreement, it certainly was not on the side of the contractors.

The argument in the appellant's brief from the amount of *profits*, is strangely misconceived. The total cost of the tunnel, including the sum awarded by the arbitrators, and excepting from the latter the *interest* included in it, and ballast item, is about $869,000: of that, the profits are only about *13 per cent*; and this in the case of a work of peculiarly uncertain character, and extending over nearly two years.

The allegation of FRAUD, made in the bill, was distinctly met in the Answers, given under oath—in particular, the answer of Mr. Samuel M. Shoemaker, a gentleman of the highest reputation, and not more conspicuous for his large wealth than for the generosity with which he used it. In his answer, he frankly took upon himself the whole responsibility for the gift to Mr. Ellicott. For that answer, filed the 17th of May 1879, when he was in health, and the full possession of his faculties, see printed Record, p. 43. In no particular, has the appellant produced evidence to contradict its statements. It says that his bestowal upon Ellicott of one half of his own share of the profits which might be made by Dull, Wiley and Andrews under their contract, was a mere *donation*, made entirely as an act of kindness to a then penniless friend, and

altogether without reference to his employment under Mr. Manning, the Engineer of the Union Railroad Company. The profits were then wholly *contingent*, but had they been less precarious, no one can truthfully assert that such an act of liberality, however rarely to be expected from some persons, was strange or unusual on the part of Mr. Shoemaker.

Ellicott himself was produced by the Defendants as a witness, and subjected to all the rigors of cross-examination, and his testimony signally confirms the honesty of the transaction, and the rectitude of Mr. Shoemaker. It does more; it shows how *impossible* it was for Mr. Ellicott, at the time of the gift, or afterwards, to render any service or advantage to the contractors. While a temporary assistant of the Chief engineer—paid by the latter, out of his own salary, and not by the Railroad Company—under an arrangement limited to an exigency, and soon afterwards terminated, he had no connection with the construction of the tunnel, made no measurements, estimates or calculations touching the business of the contractors, never inspected materials they furnished, or supervised their work. The theory of the Appellant requires the gratuitous assumption of a purpose on Mr. Shoemaker's part grossly to cheat the Company by corrupting their employee, for the paltry consideration of an interest in the reward of the perfidy no greater than he was willing to concede the agent for the service, and that that "nefarious" purpose was carried into execution by the voluntary debasement of a gentleman of General Ellicott's unblemished reputation—at the instance of his friend and benefactor.

In the entire absence of proof of such a conspiracy, the Appellant's counsel call attention to the testimony of Mr. Shoemaker—called and examined by the *plaintiff* below, but only called nearly *three years* after the filing of his Answer, and at a time when he was laboring under a mortal disease, affecting the faculties both of body and mind. Under such circumstances, any individual might well have been excused from being subjected to the strain of a judicial examination; but the cruel inferences that the Appellant and its advisers would have been ready to draw from a refusal to testify put

an obligation upon him which an honorable man could not but acknowledge under any circumstances, short of such utter physical inability as would make it quite impossible to testify. We believe we do not go out of the Record to allude to these circumstances. It is incredible that a man of Mr. Shoemaker's acknowledged intelligence could have shown the impairment of memory throughout his examination which he himself exhibited his painful consciousness of (63d and 64th anwers) had he been giving his testimony in the period of his vigor. It is in the Record that he died before the case was docketed in this Court.

Making the allowance fairly due to the testimony of a sick man, and taking the whole of it together, his answer is corroborated, and not the slightest reason is afforded to cast a shadow upon his memory.

In this connection, some salient facts deserve attention. First, the preliminary work, in the location of the line, devising the plan of the tunnel, and framing specifications—the work with which Ellicott had more or less participation, although he did nothing, even in this, which was not supervised and revised by Mr. Manning, the Chief Engineer—was performed *before the 15th of March 1871.* Second, all of this preliminary work was embodied in the printed proposals, made thoroughly public, and distributed broad cast through the country, amongst the class of persons from whom bids were to be expected. (Wrenshall, page 93.) Third, Ellicott, down to this time, had no acquaintance with Dull or Wiley, and Mr. Shoemaker was in no manner connected with them, nor had he any idea that he ever would be concerned with them. Fourth, there was much competition, and the bid of Dull & Wiley was the lowest out of the sixty received. (Wrenshall, page 90.) Fifth, the letting was conducted by Manning, personally, and he and not Ellicott was called on to give such advice as the officers of the Company might require in the construction of them. (Ellicott, page 134.) Sixth, at the time when Wiley offered Shoemaker an interest in the profits, the contract with the Railroad Company was an accomplished fact, and the written agreement of May 1, 1871,

had been *signed*, and it was sometime after the signing of the written contract that Mr. Shoemaker told Ellicott he would give him one-half of his, Shoemaker's, share of the profits. Seventh, from the time of the letting of the work onward, Ellicott, as an Engineer and assistant of Manning, had nothing to do with the Tunnel, nor was his employment, or the course of his duties, such as to bring him into relation with the contractors or their work. (See testimony of Kenly and Ellicott.) Finally, the matters of contention on which the award was rendered arose after Ellicott's employment by the Company's engineer had wholly ceased.

POINTS.

1. The bill required the defendants to answer under oath; and consequently the answers being responsive to the allegations of the bill, must be taken to be true in the absence of countervailing proof to the contrary by the satisfactory testimony of two witnesses, or of one witness and corroborating circumstances equivalent in weight to a second witness.

Vigel vs. Hopp, 104 U. S. 441.
Voorhees vs. Bonesteel & Wife, 16 Wall. 16.
41st Equity Rule.
2 Story Eq., sec. 1528.

The Answers show that Dull, Wiley and Andrews entered into no engagement with Ellicott, and that what Shoemaker did was an act of benevolence, and altogether free from fraudulent purpose. They show that no prejudice to the Complainant was intended, and that no harm in fact resulted. There is *no* proof to contradict any statement of the answers.

Mr. Shoemaker's Answer, page 43, states that sometime after the execution of the construction contract, Wiley proposed to him that he should have a one-third interest in the profits to be made under the said contract, the respondent being expected to contribute some money in the nature of capital; and the said answer further states "when the said

Wiley unexpectedly to this respondent proposed to allow him an interest of one-third in the profits from the said contract, this respondent, without attempting to estimate the probable amount of such share of profits, and in fact wholly uncertain whether there would be any profits or not, mentioned the fact of said Wiley's promise aforesaid to said Ellicott, and at the same time told him that if anything came of it he would let him, Ellicott, have one-half of what this respondent should so receive. There was no contract or agreement of any kind between the said Ellicott and this respondent on the said subject. * * * That he informed said Wiley of the fact of his having promised to divide his own share of profits with said Ellicott, and for convenience said Wiley was authorized to make payments directly to said Ellicott accordingly."

Printed Record, pages 44 and 45.

Mr. Ellicott, in his answer, (page 40, printed Record,) says that "sometime after the letting this respondent was informed by the said Samuel M. Shoemaker, who in many ways had manifested a disposition to befriend him after his return to Maryland at the termination of the civil war, that he, the said Shoemaker, was to receive one-third of any profits there might be from the contract, and that this respondent, if he pleased, might have one-half of what should so come to him, the said Shoemaker. This respondent thanked the said Shoemaker for his kindness and accepted it, without imagining that there was anything in the relation he temporarily occupied to the said chief engineer, Manning, to make it improper, or even questionable, so to do."

General allegations of fraud amount to nothing. Until connected with some *specific acts* for which *one person is in law responsible to another*, they are without effect.

Ambler vs. Choteau, 107 U. S. 591.

2. This is the case of an *Executed*, not executory, contract. The tunnel has been constructed, and the complainant has been in possession of it since the time of its completion in 1873.

Even in those cases where it is possible to restore the *status quo*, "cancelling an executed contract is an exertion of the most extraordinary power of a Court of Equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

Atlantic Delaine Co. vs. James, 94 U. S. 214.

The case of Panama & South Pacific Telegraph Co. vs. India Rubber and Telegraph Works Co., L. R. 10 Chan. 515, so much relied on by Appellant's counsel, has no application. There the contract was not executed; the cable was not delivered, nor, as it seems, was it even laid; the complainant was not bound to receive it, under the contract, without the approval of their engineer, who had become disqualified by entering into the sub-contract with the defendant; and all that had passed between the contracting parties was a partial payment of money by the complainant to the defendant, which could be and was decreed to be refunded. It is impossible to imagine that the decision in that case would have been made, if the complainant had accepted and made use of the cable, and made no offer to return it. This indeed is conceded in the opinion of Malins V. C. in that case: 10 Ch. D. 523.

4. A fraud which did not exist at the time of the making of the contract could not vitiate it.

Hale vs. Continental Life Ins. Co., 12 Fed. R. 360.
Mellish, L. J., Panama Tel. Co. vs. India Rubber Co., L. R., 10 Chan. 531.

In no case will Equity order a contract to be delivered up to be cancelled, unless there was fraud in obtaining the contract itself.

Page Wood, V. C., Onions vs. Cohen, 2 Hem. & Mill. 361.

5. The *award* and the *Judgment* in this case constitute a conclusive bar to the relief sought.

United States vs. Throckmorton, 98 U. S. 61, 65-8.
Flower vs. Lloyd, 10 Ch. D. 327; 27 W. R. 496.

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